



COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 39 and 140

RIN 3038-AE65

Exemption from Derivatives Clearing Organization Registration

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (Commission) is adopting policies and procedures that the Commission will follow with respect to granting exemptions from registration as a derivatives clearing organization (DCO). In addition, the Commission is amending certain related delegation provisions in its regulations.

DATES: Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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I. Background

A. Introduction

Section 5b(a) of the Commodity Exchange Act (“CEA”) provides that a clearing organization¹ may not “perform the functions of” a clearing organization with respect to swaps² unless the clearing organization is a DCO registered with the Commission.³

However, the CEA also permits the Commission to conditionally or unconditionally exempt a clearing organization from DCO registration for the clearing of swaps if the

¹ The term “derivatives clearing organization” is statutorily defined to mean a clearing organization in general. However, for purposes of the discussion in this release, the term “registered DCO” refers to a Commission-registered DCO, the term “exempt DCO” refers to a DCO that is exempt from registration, and the term “clearing organization” refers to a clearing organization that: (a) is neither registered nor exempt from registration with the Commission as a DCO; and (b) falls within the definition of “derivatives clearing organization” under section 1a(15) of the CEA, 7 U.S.C. 1a(15), and “clearing organization or derivatives clearing organization” under § 1.3 of the Commission’s regulations, 17 CFR 1.3.

² Section 5b(a) also provides that a clearing organization may not perform the functions of a clearing organization with respect to futures unless it is a registered DCO. This, however, is limited to futures executed on a designated contract market. Regulation 48.7 provides that a foreign board of trade registered with the Commission may clear its contracts through a registered DCO or a clearing organization that observes the Recommendations for Central Counterparties (RCCPs) or successor standards and is in good regulatory standing in its home country jurisdiction. 17 CFR 48.7. The Principles for Financial Market Infrastructures (PFMIs) are the successor standards to the RCCPs. *See* Committee on Payment and Settlement Systems and the Technical Committee of the International Organization of Securities Commissions, Principles for financial market infrastructures (Apr. 2012), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD377-PFMI.pdf>. Because an exempt DCO is required to observe the PFMIs and be in good regulatory standing in its home country, it is eligible to clear contracts executed on a foreign board of trade.

³ 7 U.S.C. 7a-1(a). Under section 2(i) of the CEA, 7 U.S.C. 2(i), activities outside of the United States are not subject to the swap provisions of the CEA, including any rules prescribed or regulations promulgated thereunder, unless those activities either have a direct and significant connection with activities in, or effect on, commerce of the United States, or contravene any rule or regulation established to prevent evasion of a CEA provision enacted under the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (Dodd-Frank Act). Therefore, pursuant to section 2(i), the DCO registration requirement extends to any clearing organization whose clearing activities outside of the United States have a direct and significant connection with activities in, or effect on, commerce of the United States.

Commission determines that the clearing organization is subject to “comparable, comprehensive supervision and regulation” by its home country regulator.⁴ The Commission issued the first exemption from DCO registration in 2015 and, to date, has exempted four clearing organizations organized outside of the United States (hereinafter referred to as “non-U.S. clearing organizations”) from DCO registration.⁵

In August 2018, the Commission proposed to codify the policies and procedures it implemented in 2015 with respect to granting exemptions from DCO registration, including permitting exempt DCOs to clear only proprietary swap positions of U.S. persons and futures commission merchants (FCMs), and not customer positions (2018 Proposal).⁶ The Commission received four substantive comment letters on the 2018 Proposal.⁷

In response to a specific request for comment as to whether the Commission should consider permitting an exempt DCO to clear swaps for U.S. customers,⁸ three commenters expressed support.⁹ In light of these comments, the Commission further

⁴ Section 5b(h) of the CEA, 7 U.S.C. 7a-1(h). Section 5b(h) also permits the Commission to exempt from DCO registration a securities clearing agency registered with the Securities and Exchange Commission; however, the Commission has not granted, nor developed a framework for granting, such exemptions.

⁵ See ASX Clear (Futures) Pty Amended Order of Exemption from Registration (Jan. 28, 2016), available at <http://www.cftc.gov/idc/groups/public/@otherif/documents/ifdocs/asxclearamdorderdcoexemption.pdf>; Korea Exchange, Inc. Order of Exemption from Registration (Oct. 26, 2015), available at <http://www.cftc.gov/idc/groups/public/@otherif/documents/ifdocs/krxdcocxemptorder10-26-15.pdf>; Japan Securities Clearing Corporation Order of Exemption from Registration (Oct. 26, 2015), available at <http://www.cftc.gov/idc/groups/public/@otherif/documents/ifdocs/jsccdcocxemptorder10-26-15.pdf>; OTC Clearing Hong Kong Limited Order of Exemption from Registration (Dec. 21, 2015), available at <http://www.cftc.gov/idc/groups/public/@otherif/documents/ifdocs/otccleardcocxemptorder12-21-15.pdf>.

⁶ See Exemption From Derivatives Clearing Organization Registration, 83 FR 39923 (Aug. 13, 2018).

⁷ The Commission received comment letters from the following in 2018: Japan Securities Clearing Corporation (JSCC); ASX Clear (Futures) Pty (ASX); Futures Industry Association (FIA) and Securities and Financial Markets Association (SIFMA); and International Swaps and Derivatives Association, Inc. (ISDA).

⁸ 2018 Proposal, 83 FR at 39930.

⁹ See ASX Clear (Futures) Pty comment letter at 1 (stating that “ASXCF supports the CFTC permitting exempt DCOs to clear swaps for U.S. person customers. ASXCF believes it would be beneficial to allow U.S. person customers to access the broadest possible range of central clearing facilities (“CCPs”) as this would provide U.S. person customers with flexibility and choice in accessing the best commercial solutions for the products that they use subject to those CCPs meeting global QCCP standards under the CPMI-

proposed in July 2019 to permit foreign intermediaries to clear swaps for U.S. customers at exempt DCOs (2019 Proposal).¹⁰

After considering the comments received in response to the 2019 Proposal,¹¹ the Commission is adopting the 2018 Proposal and, with limited exceptions,¹² declining to adopt the 2019 Proposal at this time. The Commission may consider permitting U.S. customer clearing at exempt DCOs or establishing a substantial risk test for exempt DCOs at a later time.

B. Existing Exempt DCO Orders

As previously noted, a clearing organization must be subject to comparable, comprehensive supervision and regulation by appropriate government authorities in the clearing organization's home country to be eligible for an exemption from registration as a DCO for the clearing of swaps. To date, the Commission has issued four exempt DCO orders, subject to conditions, consistent with the statute. In granting these exemptions, the Commission determined that a supervisory and regulatory framework that conforms to the PFMI is comparable to, and as comprehensive as, the supervisory and regulatory

IOSCO Principles for Financial Market Infrastructures (PFMIs)."); JSCC comment letter at 5 (stating that "JSCC would like the CFTC to consider the potential benefits of allowing U.S. customers to access exempt DCOs, using a similar approach to the correspondent clearing structure adopted for foreign futures markets, by permitting . . . non-U.S. clearing members in an exempt DCO to clear for U.S. customers, without the necessity to register as a FCM, as long as those non-U.S. clearing members can demonstrate that they are properly supervised, regulated, and licensed to provide customer clearing services in their home countries, where the regulatory authority maintains appropriate cooperative arrangements with the CFTC."); and ISDA comment letter at 3 (stating "[i]n response to the Commission's question about customer clearing, ISDA strongly believes that the CFTC should permit exempt DCOs to clear swaps for customers.").

¹⁰ See Exemption From Derivatives Clearing Organization Registration, 84 FR 35456 (Jul. 23, 2019).

¹¹ The Commission received comment letters from the following in 2019: ASX; Americans for Financial Reform Education Fund (AFR Ed Fund); Better Markets, Inc. (Better Markets); CCP12; Citadel; CME Group, Inc. (CME); FIA; OTC Clearing Hong Kong Limited (OTC Clear); Intercontinental Exchange, Inc. (ICE); International Bankers Association of Japan (IBA Japan) and Japan Financial Markets Council (JFMC); ISDA; JSCC; LCH Group (LCH); Milbank LLP (Milbank); SIFMA; and World Federation of Exchanges (WFE).

¹² As discussed further below, the Commission is adopting § 39.6(b)(6), as modified in the 2019 Proposal, to specify the information that an exempt DCO must provide to the Commission if it is unable to provide an unconditional certification that it continues to observe the PFMI in all material respects; § 39.6(b)(9) (renumbered as § 39.6(b)(8)), which provides that the Commission may condition an exemption from DCO registration on any other facts and circumstances it deems relevant; and § 39.6(f), which establishes a process for modification or termination of an exemption from DCO registration upon Commission initiative.

requirements applicable to registered DCOs.¹³ This conclusion is consistent with previous Commission determinations.¹⁴ Under exempt DCO orders granted to date, an exempt DCO is required to observe the PFMI in all material respects and be in good regulatory standing in its home country, as evidenced by an annual written representation by its home country regulator. A memorandum of understanding (MOU) must be in effect between the Commission and the home country regulator.

The existing exempt DCO orders also require the exempt DCO to supply the Commission with certain reports and information, some on a periodic basis and others based on the occurrence of specified events. For example, exempt DCOs are required to provide daily and quarterly reporting of certain information regarding the clearing activity of U.S. persons and FCMs. An exempt DCO also is required to report to the Commission if there is any change in its licensure, registration or authorization to act as a clearing organization in its home country; if the exempt DCO takes action against a U.S. person or FCM; if there is a default by a U.S. person or FCM; or if there is any change in the home country regulatory regime that is material to the exempt DCO's continuing observance of the PFMI or compliance with the requirements of the Commission's order. In addition, existing exempt DCO orders require the exempt DCO to make its books and records available for inspection by the Commission and, where a clearing member has reported information regarding a swap to a swap data repository (SDR), to also report information regarding that swap to the SDR.

¹³ The Commission holds systemically important DCOs and subpart C DCOs to requirements that are fully consistent with the PFMI. *See* 17 CFR 39.30, 39.40.

¹⁴ *See, e.g.,* § 50.52(b)(4)(i)(E), 17 CFR 50.52(b)(4)(i)(E) (permitting eligible affiliate counterparties that are located in certain jurisdictions to satisfy a condition to electing the exemption by clearing the swap through a DCO or a clearing organization that is subject to supervision by appropriate government authorities in the clearing organization's home country and that has been assessed to be in compliance with the PFMI).

Because the regulations being adopted herein are consistent with existing exempt DCO orders, the Commission does not anticipate amending any of the exempt DCO orders it has issued to date.

II. Amendments to Part 39

A. Regulation 39.1—Scope

The Commission proposed to amend § 39.1 to expand the scope of subpart A of part 39 to include a clearing organization applying for an exemption from DCO registration. This change was meant to address the inclusion in subpart A of new § 39.6 (discussed below), which sets forth the requirements for an exemption from DCO registration. The Commission did not receive any comments on this provision and is adopting it as proposed.

B. Regulation 39.2—Definitions

In connection with the proposed regulations, the Commission proposed to add five definitions to § 39.2, which apply only for purposes of part 39.

1. Exempt derivatives clearing organization

The Commission proposed to define “exempt derivatives clearing organization” to mean a clearing organization that the Commission has exempted from registration under section 5b(a) of the CEA, pursuant to section 5b(h) of the CEA and § 39.6. The Commission did not receive any comments on this proposed definition and is adopting it as proposed.

2. Good regulatory standing

The Commission proposed that, to be eligible for an exemption from registration, a clearing organization would have to be in good regulatory standing in its home country. The Commission proposed to define “good regulatory standing” to mean either there has been no finding by the home country regulator of material non-observance of the PFMI or other relevant home country legal requirements, or there has been such a finding by the

home country regulator, but it has been or is being resolved to the satisfaction of the home country regulator by means of corrective action taken by the clearing organization.

Although the Commission proposed to reference “material” non-observance of the PFMIIs or other relevant home country legal requirements, the Commission requested comment in the 2018 Proposal as to whether the definition should instead refer to all instances of non-observance. In their responses to the 2019 Proposal, ASX, JSCC, and CCP12 supported the proposed definition of “good regulatory standing.” CCP12 and JSCC commented that the proposed definition is appropriate, as individual regulators have taken differing approaches to how they apply the PFMIIs in the context of the markets that they regulate and supervise. CCP12 and JSCC did not recommend extending the definition to all instances of non-observance of the PFMIIs. JSCC further stated that regulatory changes in the home country of an exempt DCO affecting the exempt DCO’s continuing observance of the PFMIIs “occur infrequently and are easily identifiable,” due to the familiarity of exempt DCOs with the legal and regulatory framework in their home countries. ASX added that an exempt DCO is best placed to determine whether a change is material and advise the Commission accordingly.

The Commission is adopting the definition of “good regulatory standing” largely as proposed.¹⁵ The Commission’s supervisory experience with registered and exempt DCOs has shown that even well-functioning DCOs will experience instances of non-observance of applicable requirements—both material and immaterial. The Commission

¹⁵ In the 2018 Proposal, the Commission had proposed to define “good regulatory standing” in a way that would apply only to exempt DCOs. *See* Exemption From Derivatives Clearing Organization Registration, 83 FR at 39933. In a separate, subsequent proposal, the Commission proposed a definition of “good regulatory standing” that retained the previously proposed definition for exempt DCOs but added a separate provision that would apply only to DCOs subject to alternative compliance. *See* Registration With Alternative Compliance for Non-U.S. Derivatives Clearing Organizations, 84 FR 34819, 34831 (July 19, 2019); *see also* Exemption From Derivatives Clearing Organization Registration, 84 FR at 35471. The Commission has adopted the definition as it relates to DCOs subject to alternative compliance (*see* Registration with Alternative Compliance for Non-U.S. Derivatives Clearing Organizations, 85 FR 67160, 67186 (Oct. 21, 2020)); therefore, the Commission is adopting here only that portion of the definition that applies to exempt DCOs.

therefore seeks to refrain from adopting a mechanical or hyper-technical approach whereby isolated instances of non-observance would be disqualifying.¹⁶ The Commission further believes that the definition provides adequate assurance of observance of the PFMI or compliance with other relevant home country requirements, because any material non-observance must be resolved to the satisfaction of the home country regulator in order for the exempt DCO to be deemed to be in good standing.

3. Home country

The Commission proposed to define “home country” to mean, with respect to a non-U.S. clearing organization, the jurisdiction in which the clearing organization is organized. The Commission did not receive any comments on this proposed definition and is adopting it as proposed.

4. Home country regulator

The Commission proposed to define “home country regulator” to mean, with respect to a non-U.S. clearing organization, an appropriate government authority which licenses, regulates, supervises, or oversees the clearing organization’s clearing activities in the home country. The Commission did not receive any comments on this proposed definition and is adopting it as proposed.

5. Principles for Financial Market Infrastructures

The Commission proposed to define “Principles for Financial Market Infrastructures” to mean the PFMI published by the Committee on Payment and Settlement Systems (CPSS) and the Technical Committee of the International Organization of Securities Commissions (IOSCO) in April 2012, as updated, revised, or otherwise amended. The Commission proposed the “as updated, revised, or otherwise

¹⁶ While the Commission expects, in almost all cases, to defer to the home country regulator’s determination of whether an instance of non-compliance is or is not material, it does retain the discretion, in the context of the application of these rules of the Commission, to make that determination itself, and, in order to make such a determination, to obtain information from the home country regulator pursuant to the relevant memorandum of understanding.

amended” language in the 2018 Proposal to recognize that CPMI-IOSCO¹⁷ could offer further interpretation of or guidance on the PFMIIs.¹⁸ As proposed in the 2019 Proposal,¹⁹ the Commission is striking “as updated, revised, or otherwise amended” from the definition to clarify that while a home country regulator may voluntarily adopt or amend its statutes, rules, regulations, policies or combination thereof to incorporate subsequent interpretations and guidance, the home country regulator is not required to do so to maintain a regulatory regime that is comparable to and as comprehensive as the PFMIIs. The Commission believes that striking that portion of the proposed definition would provide exempt DCOs with greater regulatory certainty, as a DCO’s eligibility to remain exempt from registration would not be contingent on whether a home country regulator has adopted CPMI-IOSCO’s latest interpretations or guidance. The Commission also does not believe it is appropriate to allow any future change to the PFMIIs themselves to be incorporated into the definition without the Commission and other regulators first having the opportunity to consider the change. However, the Commission reserves the ability to incorporate future amendments to the PFMIIs within the definition if the Commission determines that such amendments are appropriate. The Commission did not receive any comments on this proposed definition and is adopting it as proposed.

C. Regulation 39.6—Exemption from DCO Registration

The Commission proposed new § 39.6 to establish a regulatory framework for the granting of exemptions from DCO registration consistent with the policies and procedures that the Commission has been following with respect to granting exemptions from DCO registration. The specific provisions of § 39.6 are discussed in greater detail below.

¹⁷ The name of CPSS was changed to the Committee on Payment and Market Infrastructures (CPMI) in 2014.

¹⁸ 2018 Proposal, 83 FR at 39925 n.14.

¹⁹ 2019 Proposal, 84 FR at 35459.

1. Regulation 39.6(a)—Eligibility for Exemption

The Commission proposed § 39.6(a) to provide that the Commission may exempt a non-U.S. clearing organization from registration as a DCO for the clearing of swaps for U.S. persons²⁰ and thereby exempt such clearing organization from compliance with the provisions of the CEA and Commission regulations applicable to registered DCOs, if the Commission determines that all of the eligibility requirements listed in § 39.6(a) are met, and that the clearing organization satisfies the conditions set forth in § 39.6(b).²¹

a. Subject to Comparable, Comprehensive Supervision and Regulation

The Commission proposed to codify in § 39.6(a)(1) the statutory authority in section 5b(h) of the CEA that the Commission may exempt a clearing organization from DCO registration for the clearing of swaps provided that the Commission determines that the clearing organization is subject to comparable, comprehensive supervision and regulation by a home country regulator. To satisfy this condition, the clearing organization would need to demonstrate that: (i) it is organized in a jurisdiction in which a home country regulator applies to the clearing organization, on an ongoing basis, statutes, rules, regulations, policies, or a combination thereof that, taken together, are consistent with the PFMI; (ii) it observes the PFMI in all material respects; (iii) and it is in good regulatory standing in its home country.

²⁰ The Commission proposed to use the interpretation of “U.S. person” as set forth in the Cross-Border Guidance, as such definition may be amended or superseded by a definition of the term “U.S. person” that is adopted by the Commission and applicable to this final rule. *See* Cross-Border Guidance, 78 FR 45292, 45316–45317.

²¹ The eligibility requirements listed in § 39.6(a) and the conditions set forth in § 39.6(b) are pre-conditions to the Commission’s issuance of any order exempting a clearing organization from the DCO registration requirement of the CEA and Commission regulations. Additional conditions that are unique to the facts and circumstances specific to a particular clearing organization could be imposed upon that clearing organization in the Commission’s order of exemption, as permitted by section 5b(h) of the CEA.

In determining that adherence to the PFMI²² satisfies the “comparable, comprehensive supervision and regulation” standard set forth in CEA section 5b(h), the Commission takes a holistic, outcomes-based approach. That is, the Commission has assessed whether, taken together in their entirety, the PFMI provide a comprehensive framework for DCO supervision and regulation that is comparable to the statutory and regulatory requirements that comprise the DCO regulatory framework – focusing, in particular, on the core principles applicable to registered DCOs set forth in CEA section 5b (DCO Core Principles).²³ The use of the PFMI as the benchmark in this context builds upon the global effort to develop an effective and consistent set of regulatory and supervisory standards for CCPs. More specifically, the PFMI address major elements critical to the safe and efficient operation of CCPs, such as risk management, adequacy of financial resources, default management, margin, settlement, and participation requirements.²⁴

The Commission recognizes that the requirements of the PFMI-compliant jurisdiction will not be identical to the Commission’s regulations in every aspect. Nevertheless, a foreign jurisdiction’s observance of the PFMI provides assurance that its supervision and regulation are sufficiently similar in purpose and effect while avoiding a demand for strict compliance with U.S. regulation that would subject CCPs to a

²² In addition to the principles applicable to central counterparties (CCPs) and other financial market infrastructures, the PFMI provide that central banks, market regulators, and other relevant authorities should observe five responsibilities. Consistent with this, the Commission expects that, in order to meet the standard of being subject to comparable, comprehensive supervision and regulation, a clearing organization’s home country regulator will observe these responsibilities. In particular, Responsibility D, Explanatory Note 4.4.1 provides that the home country regulator should adopt the PFMI, and, “[w]hile the precise means through which the principles are applied may vary from jurisdiction to jurisdiction, all CPSS and IOSCO members are expected to apply the principles to the relevant [financial market infrastructures] in their jurisdictions to the fullest extent allowed by the legal framework in their jurisdiction.” PFMI, ¶ 4.4.1. Therefore, the Commission would not find a home country regulator’s statement that it requires a clearing organization to observe the PFMI to be sufficient to meet the above standard for exemption, if the home country regulator has not itself adopted a regulatory framework that is consistent with the PFMI.

²³ 7 U.S.C. 7a-1(c)(2).

²⁴ See, e.g., Derivatives Clearing Organizations and International Standards, 78 FR 72476 (Dec. 2, 2013) (adopting final rules).

patchwork of U.S. and foreign regulations. In summary, the PFMI-focused “comparability” framework strikes the proper balance by showing an appropriate level of deference to the legal and supervisory regime of the home country jurisdiction, while fulfilling the Commission’s supervisory duty to ensure that foreign DCOs clearing for U.S. market participants are subject to a sound regulatory framework.

CME, ISDA, IBA Japan, and JFMC supported the Commission’s reliance on the PFMIs as the standard for determining whether a non-U.S. clearing organization’s home country regulatory regime is comparable and comprehensive. IBA Japan and JFMC believe this approach strikes the correct balance between addressing risk to the United States and promoting cross-border harmonization. ISDA encouraged the Commission to continue its dialogue with foreign regulators in the EU and other jurisdictions to ensure that supervision in each jurisdiction is based on deference to home country regulations and compliance with the PFMIs. ISDA argued that applying inconsistent and duplicative regulatory frameworks to clearing organizations will lead to the fragmentation of global cleared derivatives markets.

AFR Ed Fund, Citadel, and Better Markets opposed using the PFMIs to determine whether a clearing organization is subject to comparable, comprehensive supervision and regulation by its home country regulator. These commenters argued that section 5b(h) of the CEA requires that the Commission compare the CEA with the clearing organization’s home country regime and that the Commission cannot use the fact that the foreign regulatory regime conforms to the PFMIs as a substitute for determining whether the regulatory regimes are comparable, as required by section 5b(h).

AFR Ed Fund argued that the Commission’s decision to deem compliance with any foreign regulatory regime that conforms to the PFMIs as fulfilling the statutory requirements for exempting a clearing organization from registration under U.S. law means that a foreign clearing organization can be exempted from registration without any

determination that it is subject to supervision and regulation that is “in any way” comparable to the relevant U.S. laws or regulations. AFR Ed Fund further argued that the Commission “cannot substitute its judgement as to whether a foreign regime conforms to the PFMI, a set of broad principles with no standing under U.S. law, for the statutory mandate to ensure that a DCO is subject to a regime comparable to U.S. regulation and supervision.”

Similarly, Better Markets argued that the proposal unlawfully treats the PFMI as being the equivalent of U.S. law for purposes of making a comparability determination under section 5b(h). Better Markets also argued that the U.S. statutory and regulatory requirements for DCOs are not the equivalent of the PFMI because the PFMI do not have the force of law until they are incorporated into the home jurisdiction’s laws or regulations, and because, even when the PFMI are implemented, material differences may exist between the PFMI-compliant regulatory regime and the PFMI principles. Better Markets further argued that because section 5b(h) is only implicated if the non-U.S. clearing organization is subject to the DCO registration requirement of section 5b(a) in the first instance, Congress limited the Commission’s comparability inquiry to determining whether the non-U.S. regime is comparable to the U.S. regulatory requirements that would otherwise apply to the clearing organization. Better Markets claimed that the 2018 Proposal and the four existing exemptive orders suffer from the same legal deficiencies alleged in its comment.

Citadel believes the Commission should directly compare its regulatory regime with that of the clearing organization’s home country. Citadel pointed out that the PFMI do not address a number of important elements of the Commission’s regulatory framework for DCOs, including non-discriminatory access, straight-through processing, gross margining, public disclosure of rule filings, and public information. Lastly, Citadel

stated that U.S. customer access should be considered as a part of the overall comparability assessment.

The Commission notes that section 5b(h) provides that the Commission may exempt a clearing organization from DCO registration “if the Commission determines that the [] clearing organization is subject to comparable, comprehensive supervision and regulation” Accordingly, the Commission may, and does, determine that a foreign regulatory regime that conforms to the PFMI constitutes “comparable, comprehensive supervision and regulation by . . . the appropriate government authorities in the home country of the organization,” and therefore that a clearing organization subject to such a regime may be exempted from the DCO registration requirements.²⁵ As mentioned previously, the PFMI is comparable to the DCO Core Principles and the implementing Commission regulations in purpose and scope. Both address major elements critical to the safe and efficient operations of clearing organizations, such as risk management, adequacy of financial resources, default management, margin, settlement, and participation requirements.²⁶ Regulation 39.40 expressly states that subpart C of part 39 of the Commission’s regulations “is intended to establish standards which, together with subparts A and B of [part 39], are consistent with” section 5b(c) of the CEA and the PFMI and should be interpreted in that context.

Regarding Citadel’s comment, the Commission acknowledges that the PFMI is not identical to, nor as detailed as, part 39. However, “comparable and comprehensive” does not mean identical. The Commission adopted the part 39 requirements for

²⁵ As stated previously, this conclusion is consistent with other previous Commission determinations. *See, e.g.,* Regulation 50.52(b)(4)(i)(E), 17 CFR 50.52(b)(4)(i)(E) (permitting eligible affiliate counterparties that are located in certain jurisdictions to satisfy a condition to electing the exemption by clearing the swap through a DCO or a clearing organization that is subject to supervision by appropriate government authorities in the clearing organization’s home country and that has been assessed to be in compliance with the PFMI).

²⁶ *See, e.g.,* Derivatives Clearing Organizations and International Standards, 78 FR 72476 (Dec. 2, 2013) (adopting final rules).

registered DCOs, which may generally clear futures, swaps, and other instruments for various U.S. persons to the extent permissible under the CEA. Here, in light of the scope of an exempt DCO's clearing activities, the PFMIIs are sufficiently comparable and comprehensive to provide the appropriate framework for the supervision and regulation of exempt DCOs permitted to clear in accordance with this final rule and other relevant conditions contained within any exemptive order granted by the Commission. Application of the PFMIIs in the context of U.S. customer clearing, which is not part of the final rule, can be considered if the Commission takes up the issue of customer clearing at exempt DCOs.

The Commission is adopting § 39.6(a)(1) as proposed.

b. Memorandum of Understanding

The Commission proposed § 39.6(a)(2) to require that, in order for a clearing organization to be eligible for an exemption from registration, an MOU or similar arrangement satisfactory to the Commission must be in effect between the Commission and the clearing organization's home country regulator, pursuant to which, among other things, the home country regulator agrees to provide to the Commission any information that the Commission deems necessary to evaluate the clearing organization's initial and continued eligibility for exemption or to review compliance with any conditions of such exemption.

ISDA commented that the Commission should identify the types of information that it expects to require under the MOU. ISDA argued that it is important for the Commission to provide additional clarity regarding the specific information it will require to evaluate the exempt DCO's initial and continued eligibility for exemption to ensure that providing such information would not violate any local laws. ISDA believes that doing so would allow the Commission to access necessary information while, at the

same time, taking into account any prohibitions on providing certain types of information under local laws.

In response to ISDA's comment, the Commission notes that § 39.6(e)(2) sets forth the information that an applicant for exemption from DCO registration must provide to the Commission. That information would not be specified in an MOU because it must be provided by the applicant, not the applicant's home country regulator. However, an MOU between the Commission and the home country regulator would allow the Commission to seek the home country regulator's assistance in analyzing and interpreting the information as necessary to determine the applicant's eligibility for an exemption. If the applicant is granted an exemption, the MOU would allow the Commission to gather additional information from the home country regulator as necessary to determine the exempt DCO's continued eligibility. For example, if an exempt DCO provides notice to the Commission of a change in its home country regulatory regime pursuant to § 39.6(c)(2)(iii), the Commission may wish to discuss the change with the home country regulator to understand what impact, if any, the change may have on the exempt DCO's ability to comply with the conditions of its exemption.

The Commission notes that it already has several MOUs with other regulators in place, and those specific to the oversight of clearing organizations are generally similar in content and scope.²⁷ To the extent that local laws limit a regulator's ability to share information with the Commission, the Commission works closely with the regulator to resolve any issues.

The Commission is adopting § 39.6(a)(2) as proposed.

2. Regulation 39.6(b)—Conditions of Exemption

²⁷ CFTC Memoranda of Understanding: Cooperation for Supervisory, Prudential, and Risk Assessment Purposes, https://www.cftc.gov/International/MemorandaofUnderstanding/mouInfo_Sharing_for_Supervisor.html.

The Commission proposed § 39.6(b) to set forth the conditions to which an exempt DCO would be subject. These are the same conditions the Commission has imposed on exempt DCOs through the orders of exemption that it has issued to date.

a. Clearing by or for U.S. Persons and Futures Commission Merchants

The Commission proposed § 39.6(b)(1) to prohibit the clearing of U.S. customer positions at an exempt DCO. An FCM would be permitted to be a clearing member of an exempt DCO, or maintain an account with an affiliated broker that is a clearing member, for the purpose of clearing swaps only for the FCM itself and those persons identified in the definition of “proprietary account” in § 1.3 of the Commission’s regulations.

The Commission requested comment in the 2018 Proposal as to whether the Commission should consider permitting an exempt DCO to clear swaps for U.S. customers. The Commission received four comments in response to that request. As noted above, the Commission responded to these comments by issuing the 2019 Proposal, which proposed to permit U.S. customers to clear at an exempt DCO, but only through foreign intermediaries, not FCMs. However, at this time, the Commission is adopting § 39.6(b)(1) largely as proposed in the 2018 Proposal, to permit an exempt DCO to clear only proprietary positions of U.S. persons and FCMs, and not customer positions. Specifically, § 39.6(b)(1) provides that an exempt DCO must have rules that limit swaps clearing services for U.S. persons and FCMs as follows: (i) a U.S. person that is a clearing member of the exempt DCO may clear swaps for itself and those persons identified in the definition of “proprietary account” set forth in § 1.3;²⁸ (ii) a non-U.S. person that is a clearing member of the exempt DCO may clear swaps for any affiliated U.S. person identified in the definition of “proprietary account” set forth in § 1.3 of this

²⁸ The reference to “those persons identified in the definition of ‘proprietary account’ set forth in § 1.3,” refers to those persons associated with the U.S. person that is a clearing member in the manner provided in the definition of “proprietary account” as if the U.S. person is the “individual, a partnership, corporation or other type of association” that carries the proprietary account on its books and records, and not simply to such types of persons identified in the definition generally.

chapter;²⁹ and (iii) an FCM may be a clearing member of the exempt DCO, or otherwise maintain an account with an affiliated broker that is a clearing member, for the purpose of clearing only proprietary swaps positions for itself and those persons identified in the definition of “proprietary account” set forth in § 1.3.³⁰

b. Open Access

The Commission proposed § 39.6(b)(2) to codify the “open access” requirements of section 2(h)(1)(B) of the CEA, which applies to both registered and exempt DCOs, with respect to swaps cleared by an exempt DCO to which one or more of the counterparties is a U.S. person.³¹ Paragraph (b)(2)(i) would require an exempt DCO to maintain rules providing that all such swaps with the same terms and conditions (as defined by product specifications established under the exempt DCO’s rules) submitted to the exempt DCO for clearing are economically equivalent and may be offset with each other, to the extent that offsetting is permitted by the exempt DCO’s rules. Paragraph (b)(2)(ii) would require an exempt DCO to maintain rules providing for non-discriminatory clearing of such a swap executed either bilaterally or on or subject to the rules of an unaffiliated electronic matching platform or trade execution facility, *e.g.*, a swap execution facility. The Commission did not receive any comments on this provision. The Commission is adopting § 39.6(b)(2) as proposed.

c. Consent to Jurisdiction; Designation of Service of Process

²⁹ This provision is intended to permit what would be considered clearing of “proprietary” positions under the Commission’s regulations, even if the positions would qualify as “customer” positions under the laws and regulations of an exempt DCO’s home country. This provision clarifies that an exempt DCO may clear positions for FCMs if the positions are not “customer” positions under the Commission’s regulations.

³⁰ The reference to “those persons identified in the definition of ‘proprietary account’ set forth in § 1.3,” is intended to refer to those persons associated with the FCM in the manner provided in the definition of “proprietary account” as if the FCM is the individual, a partnership, corporation or other type of association that carries the proprietary account on its books and records, and not simply to such types of persons identified in the definition generally.

³¹ 7 U.S.C. 2(h)(1)(B).

The Commission proposed § 39.6(b)(3) to require that an exempt DCO consent to jurisdiction in the United States and designate an agent in the United States, for notice or service of process, pleadings, or other documents issued by or on behalf of the Commission or the U.S. Department of Justice in connection with any actions or proceedings against, or any investigations relating to, the exempt DCO or any U.S. person or FCM that is a clearing member or that clears swaps through an affiliated clearing member. The name of the designated agent would be submitted as part of the clearing organization's application for exemption. If an exempt DCO appoints another agent to accept such notice or service of process, the exempt DCO would be required to promptly inform the Commission of this change. This is consistent with requirements currently imposed in the registration orders of DCOs that are organized outside of the United States as well as in each of the orders of exemption that the Commission has issued thus far. The Commission did not receive any comments on this provision. The Commission is adopting § 39.6(b)(3) as proposed.

d. Compliance

The Commission proposed § 39.6(b)(4) as a general provision that would require an exempt DCO to comply, and demonstrate compliance as requested by the Commission, with any condition of the exempt DCO's order of exemption. The Commission did not receive any comments on this provision. The Commission is adopting § 39.6(b)(4) as proposed.

e. Inspection of Books and Records

The Commission proposed § 39.6(b)(5) to require an exempt DCO to make all documents, books, records, reports, and other information related to its operation as an exempt DCO (books and records) open to inspection and copying by any Commission representative, and to promptly make its books and records available and provide them to Commission representatives upon request. This condition is consistent with section 5b(h)

of the CEA, which provides that the Commission may exempt a DCO from registration with conditions that may include requiring that the DCO be available for inspection by the Commission and make available all information requested by the Commission.

ISDA believes that the proposed condition is too broad and that the Commission should specify how and when it would undertake inspections of exempt DCOs. ISDA also believes, to foster cross-border regulatory cooperation, the Commission should consider obtaining consent for inspections from an exempt DCO's home country regulator prior to conducting onsite inspections. ISDA suggested, at a minimum, the Commission should provide prior notice to an exempt DCO's home country regulator in connection with any inspection or ask the home country regulator for the required information. ISDA argued that, not only would this promote comity and coordination, but it would also ensure that such inspections are not overly burdensome or in violation of local laws. ISDA further suggested that the Commission should consider including an exempt DCO's home country regulator during inspections, which would assist the Commission in interpreting and analyzing the exempt DCO's books and records in the context of the regulatory requirements of a particular jurisdiction.

The Commission is adopting § 39.6(b)(5) as proposed. The Commission notes that it does not anticipate conducting routine site visits to exempt DCOs. However, the Commission may request a DCO's books and records to ensure that, among other things, the exempt DCO continues to meet the eligibility requirements for an exemption as well as the conditions of its exemption. The Commission further notes that it already follows many of ISDA's recommendations in the context of examining non-U.S. DCOs, and it would expect to do the same in the context of an exempt DCO; such interactions with the home country regulator would be addressed in the MOU.

f. Observance of the PFMI

In the 2018 Proposal, the Commission proposed § 39.6(b)(6) to require that an exempt DCO provide an annual certification that it continues to observe the PFMI in all material respects, within 60 days following the end of its fiscal year. In the 2019 Proposal, the Commission proposed to modify (and renumber) this condition to specify the information that an exempt DCO must provide to the Commission if it is unable to provide an unconditional certification that it continues to observe the PFMI in all material respects. Specifically, the exempt DCO would be required to identify the underlying material non-observance of the PFMI and explain whether and how such non-observance has been or is being resolved by the exempt DCO. The Commission proposed this modification in recognition of the fact that at some point an exempt DCO may not be able to certify that it observes the PFMI in all material respects. The exempt DCO must disclose that information to the Commission and allow the Commission to consider its impact on the exempt DCO's standing.

The Commission did not receive comments on this provision. The Commission is adopting § 39.6(b)(6) as proposed.

g. Representation of Good Regulatory Standing

The Commission proposed § 39.6(b)(7) to require that the Commission receive an annual written representation from a home country regulator that an exempt DCO is in good regulatory standing, within 60 days following the end of the exempt DCO's fiscal year. The Commission received comments on the definition of "good regulatory standing," as discussed above, but did not receive comments on this provision. The Commission is adopting § 39.6(b)(7) as proposed.

h. Other Conditions

Lastly, the Commission proposed § 39.6(b)(9) in the 2019 Proposal to provide that the Commission may condition an exemption from DCO registration on any other

facts and circumstances it deems relevant.³² The Commission stated that, in doing so, it would be mindful of principles of international comity. For example, the Commission could take into account the extent to which the relevant foreign regulatory authorities defer to the Commission with respect to oversight of registered DCOs organized in the United States.

CME strongly supported the Commission's retaining discretion to condition an exemption from DCO registration on principles of international comity and the extent to which the relevant home country regulator defers to the Commission with respect to oversight of registered DCOs organized in the United States that are accessed by local participants. CME believes the Commission's efforts to support mutual deference among regulators across the globe will foster efficient markets and cooperative behavior to the benefit of all. As a result, CME suggested that the Commission codify its ability to condition an exemption from DCO registration on matters of international comity and reciprocity within the regulatory text.

The Commission is declining to specifically condition an exemption from DCO registration on matters of international comity and reciprocity, but only because it believes § 39.6(b)(9) as proposed is sufficient for those purposes. As noted in the 2019 Proposal, the Commission could use its discretion under § 39.6(b)(9) to advance the goal of regulatory harmonization, consistent with the express directive of Congress that the Commission coordinate and cooperate with foreign regulatory authorities on matters related to the regulation of swaps.³³ The recognition that market participants and market facilities in a global swaps market are subject to multiple regulators and potentially

³² See 7 U.S.C. 7a-1(h) (stating, in relevant part, that the Commission may exempt, conditionally or unconditionally, a DCO from registration under that section for the clearing of swaps).

³³ In order to promote effective and consistent global regulation of swaps, section 752 of the Dodd-Frank Act directs the Commission to consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to the regulation of swaps, among other things. Section 752 of the Dodd-Frank Act, Public Law 111-203, 124 Stat. 1376 (2010), codified at 15 U.S.C. 8325.

duplicative regulations, and can therefore benefit from regulatory harmonization and mutual deference among regulators, underpins the exempt DCO framework. The framework is intended to encourage collaboration and coordination among U.S. and foreign regulators in establishing comprehensive regulatory standards for swaps clearing. In addition, the framework seeks to promote fair competition and a level playing field for all DCOs. As a result, the Commission will consider the degree of deference that a home country regulator extends to the Commission's oversight of U.S. DCOs in determining whether to extend the benefits of exemption from registration to DCOs in that jurisdiction, both at the point of initially exempting a non-U.S. DCO, and in determining whether compliance under that framework should continue. The Commission is adopting § 39.6(b)(9) as proposed (renumbered as § 39.6(b)(8)).

3. Regulation 39.6(c)—General Reporting Requirements

The Commission proposed § 39.6(c) to require an exempt DCO to report certain information that would assist the Commission in evaluating the continued eligibility of the exempt DCO for exemption, reviewing the exempt DCO's compliance with any conditions of its exemption, or monitoring the risk of U.S. persons and their affiliates clearing swaps at the exempt DCO.

Specifically, the Commission proposed § 39.6(c)(2)(i) to require that an exempt DCO compile a report as of the end of each trading day, and submit it to the Commission by 10:00 a.m. U.S. Central time on the following business day, containing with respect to swaps: (A) initial margin requirements and initial margin on deposit for each U.S. person; and (B) daily variation margin, separately listing the mark-to-market amount collected from or paid to each U.S. person. However, if a clearing member margins on a portfolio basis its own positions and the positions of its affiliates, and either the clearing member or any of its affiliates is a U.S. person, the exempt DCO would be required to report initial margin requirements and initial margin on deposit for all such positions on a

combined basis for each such clearing member on a combined basis and separately list the mark-to-market amount collected from or paid to each such clearing member, on a combined basis. These requirements are similar to certain reporting requirements applicable to registered DCOs in § 39.19(c)(1). These reports will provide the Commission with information regarding the cash flows associated with U.S. persons clearing swaps through exempt DCOs in order to analyze the risks presented by such U.S. persons and to assess the extent to which U.S. business is being cleared by each exempt DCO.

The Commission proposed § 39.6(c)(2)(ii)(A) and (B) to require an exempt DCO to compile a report as of the last day of each fiscal quarter, and submit it to the Commission no later than 17 business days after the end of the fiscal quarter, containing the aggregate clearing volume of U.S. persons during the fiscal quarter, and the average open interest of U.S. persons during the fiscal quarter, respectively. If a clearing member is a U.S. person, this data would include the transactions and positions of the clearing member and all affiliates for which the clearing member clears; if a clearing member is not a U.S. person, the data would only have to include the transactions and positions of affiliates that are U.S. persons. The Commission proposed § 39.6(c)(2)(ii)(C) to require that an exempt DCO's quarterly report to the Commission contain a list of U.S. persons and FCMs³⁴ that are either clearing members or affiliates of any clearing member, with respect to the clearing of swaps, as of the last day of the fiscal quarter. This information would enable the Commission, in conducting risk surveillance of U.S. persons and swaps

³⁴ Such FCMs may or may not be U.S. persons. The Commission will not require that exempt DCOs provide daily information regarding initial margin requirements, initial margin on deposit, and daily variation margin, or quarterly aggregate clearing volume or average open interest, with respect to swaps, for FCMs that are not U.S. persons (unless reporting would otherwise be required because such FCMs are affiliates of U.S. persons). However, the Commission has a supervisory interest in receiving information regarding which of its registered FCMs are clearing members or affiliates of clearing members, with respect to the clearing of swaps at an exempt DCO.

markets more broadly, to better understand and evaluate the nature and extent of the cleared swaps activity of U.S. persons.

The Commission proposed paragraphs (c)(2)(iii) through (viii) of § 39.6 to require an exempt DCO to provide information to the Commission upon the occurrence of certain specified events. The Commission proposed § 39.6(c)(2)(iii) to require an exempt DCO to provide prompt notice to the Commission regarding any change in its home country regulatory regime that is material to the exempt DCO's continuing observance of the PFMI's or with any requirements set forth in § 39.6, or the order of exemption issued by the Commission.

The Commission proposed § 39.6(c)(2)(iv) to require an exempt DCO to provide to the Commission, to the extent that it is available to the exempt DCO, any assessment of the exempt DCO's or the home country regulator's observance of the PFMI's by a home country regulator or other national authority, or an international financial institution or international organization.³⁵

The Commission proposed § 39.6(c)(2)(v) to require an exempt DCO to provide to the Commission, to the extent that it is available to the exempt DCO, any examination report, examination findings, or notification of the commencement of any enforcement or disciplinary action by a home country regulator.

The Commission proposed § 39.6(c)(2)(vi) to require an exempt DCO to provide immediate notice to the Commission of any change with respect to its licensure, registration, or other authorization to act as a clearing organization in its home country.

The Commission proposed § 39.6(c)(2)(vii) to require an exempt DCO to provide immediate notice to the Commission in the event of a default (as defined by the exempt DCO in its rules) by a U.S. person or FCM clearing swaps, including the name of the

³⁵ Such an international organization may include the International Monetary Fund or World Bank. *See* PFMI's, ¶ 1.33.

U.S. person or FCM, a list of the positions held by the U.S. person or FCM, and the amount of the U.S. person's or FCM's financial obligation.

Finally, the Commission proposed § 39.6(c)(2)(viii) to require an exempt DCO to provide notice to the Commission of any action the exempt DCO has taken against a U.S. person or FCM, no later than two business days after taking such action.

The Commission requested comment in the 2018 Proposal, with regard to proposed § 39.6(c)(2)(iii), on whether, instead of requiring an exempt DCO to provide prompt notice to the Commission regarding any change in its home country regulatory regime that is material to the exempt DCO's continuing observance of the PFMIs, any requirements set forth in § 39.6, or the order of exemption issued by the Commission (thereby requiring the exempt DCO to determine whether a change is material), the Commission should require an exempt DCO to provide prompt notice of *any* change in its home country regulatory regime.

ASX and JSCC supported requiring an exempt DCO to determine whether a change to its home country regulatory regime constitutes a material change. ASX and JSCC believe an exempt DCO is best situated to easily identify changes to its home country regulatory regime as well as determine whether such changes are material. JSCC also commented that having the exempt DCO make this materiality determination would avoid redundant reporting and review for an exempt DCO and the Commission of *any* change to the home country regulatory regime.

The Commission agrees with the commenters that an exempt DCO should be required to determine whether a change to its home country regulatory regime would constitute a material change, especially as the Commission would otherwise need to review changes to home country regulatory regimes in multiple jurisdictions.

The Commission is adopting § 39.6(c) as proposed.

4. Regulation 39.6(d)—Swap Data Reporting Requirements

The Commission proposed § 39.6(d) to require an exempt DCO, if it accepts for clearing a swap that has been reported to an SDR pursuant to part 45 of the Commission's regulations, to report to an SDR data for the two swaps that result from the novation of the original swap. The exempt DCO would also be required to report the termination of the original swap to the same SDR that received the original swap report. To avoid duplicative reporting for such transactions, the Commission also proposed to require an exempt DCO to have rules that prohibit the reporting of the two new swaps by the counterparties to the original swap.

Citadel commented that the Commission should ensure that reporting requirements pursuant to parts 43 and 45 of the Commission's regulations continue to be fulfilled in an accurate manner for in-scope transactions, including the "cleared or uncleared" field in part 43 and the "clearing indicator" and "clearing venue" fields in part 45. JSCC supported clearly defining an exempt DCO's swap data reporting obligations within part 39. However, JSCC was concerned that the counterparties to the original swap would still be required to report the cleared transaction arising from the novation of the original swap at an exempt DCO to an SDR under part 45, which JSCC viewed as in conflict with proposed § 39.6(d). JSCC commented that proposed § 39.6(d) could create confusion about reporting expectations for exempt DCOs and their respective clearing members.³⁶ JSCC was hopeful that part 45 would be amended to address this issue.

CCP12 acknowledged that transparency in the swaps markets, which it believes is supported by SDR reporting, provides a number of benefits. However, CCP12 argued that the current SDR reporting requirements applied to exempt DCOs pose significant operational challenges, such as on-boarding with a U.S. SDR that has a different reporting format than that of the exempt DCO's home country. CCP12 also commented

³⁶ JSCC cited CFTC Letter 18-03: Extension of No-Action Relief from Certain Reporting Obligations for Counterparties Clearing Swaps through Derivatives Clearing Organizations Acting Under Exemptive Orders or No-Action Relief (Feb. 20, 2018).

that SDR reporting fees are a burden based on the number of reported transactions. The Commission believes that transparency in the swaps market as provided by the swap data reporting requirements, which are applicable to all registered DCOs, including non-U.S. DCOs and existing exempt DCOs, strongly warrants requiring exempt DCOs to report such information pursuant to § 39.6(d).

In response to JSCC's concern that § 39.6(d) could cause confusion given the time-limited no-action relief provided in CFTC Letter 18-03, the Commission notes that § 39.6(d) specifically requires an exempt DCO to have rules that prohibit the counterparties to the original swap from reporting to an SDR pursuant to part 45 the two new swaps which result from novation of the original swap. As explained in the 2018 Proposal, the exempt DCO's rules prohibiting reporting by the counterparties to the original swap are intended to avoid duplicative reporting.³⁷

In response to CCP12's concern related to onboarding with an SDR that uses a different reporting format than the exempt DCO's home country, the Commission notes that it recently adopted revisions to part 45 of the Commission's regulations that include standardized data fields that accommodate reporting for swaps cleared under either the "agency" clearing model or the "principal" clearing model.³⁸ In regards to SDR fees, the Commission notes that SDRs are required to provide their services on a fair, open, and equal basis and an SDR's fees must be equitable and applied in a uniform and non-discriminatory manner.³⁹ As such, the burdens associated with SDR fees for exempt

³⁷ See Exemption From Derivatives Clearing Organization Registration, 83 FR at 39928, n.32.

³⁸ See Swap Data Recordkeeping and Reporting Requirements, 85 FR 75503, 75567 (Nov. 25, 2020) (appendix 1 to part 45 contains the "clearing member" field, which contains instructions for reporting the field under the agency clearing model or the principal clearing model). See also Technical Specification Document: Parts 43 and 45 swap reporting and public dissemination requirements at 1-2, available at https://www.cftc.gov/media/3496/DMO_Part43_45TechnicalSpecification022020/download (containing the technical specifications for the "clearing member" field).

³⁹ See 17 CFR 49.27 (containing the SDR access and fees requirements).

DCOs will be no different than the burdens for other DCOs that clear swaps that must be reported to SDRs. The Commission is adopting § 39.6(d) as proposed.

5. Regulation 39.6(e)—Application Procedures

The Commission proposed § 39.6(e) to codify the procedures a non-U.S. clearing organization must follow when applying for an exemption from DCO registration.

Specifically, the Commission proposed § 39.6(e)(1) to require a clearing organization to file an application for exemption with the Secretary of the Commission in the format and manner specified by the Commission. After reviewing the application, the Commission may: (1) grant an exemption without conditions; (2) grant an exemption with conditions; or (3) deny the application.

Proposed § 39.6(e)(2) requires an applicant to submit a complete application, including all applicable information and documentation as outlined therein, and provide that the Commission will not commence processing an application unless the application is complete. The application must include: (i) a cover letter providing general information identifying the applicant, its regulatory licenses or registrations, and relevant contact information; (ii) a description of the applicant's business plan, including swap asset classes that it would clear and whether the swaps are subject to a clearing requirement issued by the Commission or the applicant's home country regulator; (iii) documents that demonstrate that the applicant is held to requirements consistent with the PFMI; (iv) a written representation from the applicant's home country regulator that the applicant is in good regulatory standing; (v) copies of the applicant's most recent disclosures necessary to observe the PFMI, including the financial market infrastructure disclosure template set forth in Annex A to the Disclosure Framework and Assessment Methodology for the PFMI;⁴⁰ (vi) a representation that the applicant will comply with

⁴⁰ See CPSS-IOSCO, Principles for financial market infrastructures: Disclosure framework and Assessment methodology (Dec. 2012), at 82 *et seq.*, available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD396.pdf>.

each of the requirements and conditions of its exemption; (vii) a draft of the applicant's rules showing compliance with various requirements for an exemption; and (viii) the applicant's consent to jurisdiction in the United States, with contact information for the applicant's designated U.S. agent.

Proposed § 39.6(e)(3) provides that, at any time during the Commission's review of an application for exemption, the Commission may request that the applicant submit supplemental information in order for the Commission to process the application, and require an applicant to file such supplemental information in the format and manner specified by the Commission. Regulation 39.3(a)(4), which applies to applications for DCO registration, contains a similar provision.

Proposed § 39.6(e)(4) requires an applicant to promptly amend its application if it discovers a material omission or error, or if there is a material change in the information provided to the Commission in the application or other information provided in connection with the application. This provision is similar to § 39.3(a)(5), which addresses amendments to applications for DCO registration.

Proposed § 39.6(e)(5) identifies those sections of an application for exemption from registration that would be made public, including the cover letter required in proposed § 39.6(e)(2)(i); documents demonstrating that the applicant is organized in a jurisdiction in which its home country regulator applies to the applicant statutes, rules, regulations, and/or policies that are consistent with the PFMI as proposed in § 39.6(e)(2)(iii); disclosures necessary to observe the PFMI as proposed in § 39.6(e)(2)(v);⁴¹ draft rules that meet the requirements of proposed § 39.6(b)(1) (U.S. persons clearing requirements), § 39.6(b)(2) (open access requirements); and § 39.6(d) (swap data reporting requirements), as applicable; and any other part of the application

⁴¹ The Disclosure Framework contemplates that CCPs will make public disclosures pursuant to the Disclosure Framework. *See id.* at 1.

not covered by a request for confidential treatment, subject to § 145.9. This provision is similar to § 39.3(a)(6), which identifies those portions of an application for registration as a DCO that are made public.

The Commission did not receive comments on this aspect of the proposal. The Commission is adopting § 39.6(e) as proposed.

6. Regulation 39.6(f), (g), and (h)—Modification or Termination of Exemption; Notice to Clearing Members of Termination of Exemption

The Commission initially proposed to provide in § 39.6(f) that the Commission may modify the terms and conditions of an order of exemption, either at the request of the exempt DCO or on the Commission's own initiative, based on changes to or omissions in material facts or circumstances pursuant to which the order of exemption was issued, or for any reason in the Commission's discretion. This is a further expression of the Commission's discretionary authority under section 5b(h) of the CEA to exempt a clearing organization from registration "conditionally or unconditionally," and it reflects the Commission's authority to act with flexibility in responding to changed circumstances affecting an exempt DCO. In the 2019 Proposal, the Commission proposed to also provide for the termination of an exemption upon the Commission's initiative, and to set forth the process by which the Commission would issue a modification or termination.

Under proposed § 39.6(f)(1), the Commission may modify or terminate an exemption from DCO registration, in its discretion and upon its own initiative, if the Commission determines that there are changes to or omissions in material facts or circumstances pursuant to which the order of exemption was issued. The Commission may also modify or terminate an exemption from DCO registration if any of the terms and conditions of the order of exemption are not met, including: (i) the exempt DCO

observing the PFMI in all material respects; and (ii) the exempt DCO being subject to comparable, comprehensive supervision and regulation by its home country regulator.⁴²

The Commission proposed § 39.6(f)(2), (f)(3), and (f)(4) to set forth the process for modification or termination of an exemption upon the Commission's initiative.

Under proposed § 39.6(f)(2), the Commission must first provide written notification to an exempt DCO that the Commission is considering whether to modify or terminate the DCO's exemption and the basis for that consideration.

Under proposed § 39.6(f)(3), an exempt DCO may respond to the notification in writing no later than 30 business days following receipt of the Commission's notification, or at such later time as the Commission may permit in writing. The Commission believes that a minimum 30-business day timeframe would allow the Commission to take timely action to protect its regulatory interests while providing the exempt DCO with sufficient time to develop its response.

The Commission proposed § 39.6(f)(4) to provide that, following receipt of a response from the exempt DCO, or after expiration of the time permitted for a response, the Commission may either: (i) issue an order terminating the exemption as of a date specified in the order; (ii) issue an amended order of exemption that modifies the terms and conditions of the exemption; or (iii) provide written notification to the exempt DCO that the Commission has determined to neither modify nor terminate the exemption.

ASX, JSCC, and ISDA believe that an automatic termination of exemptions could result in market disruption and legal uncertainty, particularly for U.S. persons clearing through the exempt DCO. However, the commenters recognized that the Commission must ensure that exempt DCOs continue to operate safe and efficient clearing operations under a regime that is consistent with the PFMI. Therefore, the commenters suggested

⁴² In the 2019 Proposal, proposed § 39.6(f)(1) included a subparagraph (iii) that is not being adopted at this time.

that the Commission should first commit to working with the exempt DCO and its home country regulator(s) to resolve any issues with compliance with the terms and conditions of the order of exemption. If these efforts are not successful, the commenters suggested that the Commission allow for an appropriate transitional period so that affected clearing members and customers may migrate to other clearing organizations in an orderly manner.

The Commission agrees with the commenters that sufficient time for transition will be needed in the event that it terminates an exemption from registration. That is why the Commission proposed in § 39.6(f)(4)(i) that it would issue an order of termination with an effective date intended to provide the exempt DCO with a reasonable amount of time to wind down its swap clearing services for U.S. persons, including the liquidation or transfer of the positions and related collateral of U.S. persons, as necessary. The Commission is adopting § 39.6(f) as proposed.

Furthermore, the Commission proposed § 39.6(g) to set forth the framework under which an exempt DCO may petition the Commission to terminate its exemption and the applicable procedures. Specifically, pursuant to proposed § 39.6(g)(1), an exempt DCO may request that the Commission terminate its exemption if the exempt DCO: (i) no longer qualifies for an exemption as a result of changed circumstances; (ii) intends to cease clearing swaps for U.S. persons; or (iii) submits an application for registration in accordance with § 39.3(a)(2) or § 39.3(a)(3), as applicable. The Commission further proposed in § 39.6(g)(2) that the petition for termination must include a detailed explanation for the request and describe the exempt DCO's plans for liquidation or transfer of the positions and related collateral of U.S. persons, if applicable. Under proposed § 39.6(g)(3), the Commission would issue an order of termination within a reasonable time appropriate to the circumstances or in conjunction with the issuance of an order of registration, if applicable.

The Commission did not receive any comments on § 39.6(g). The Commission is adopting this provision as proposed.

Lastly, the Commission proposed § 39.6(h) to provide that, following the Commission's issuance of an order of termination (unless issued in conjunction with the issuance of an order of registration), the exempt DCO must provide immediate notice of such termination to its clearing members. The notice must include: (1) a copy of the Commission's order of termination; (2) a description of the procedures for orderly disposition of any open swaps positions that were cleared for U.S. persons; and (3) an instruction to clearing members, requiring that they provide the exempt DCO's notice of such termination to all U.S. persons clearing swaps through such clearing members. The Commission did not receive any comments on this provision. The Commission is adopting § 39.6(h) as proposed.

D. Regulation 39.9—Scope

The Commission proposed to revise § 39.9 to make it clear that the provisions of subpart B apply to any DCO, as defined under section 1a(15) of the CEA and § 1.3, that is registered with the Commission as a DCO pursuant to section 5b of the CEA, but do not apply to any exempt DCO. This revision was intended to clarify that the subpart B regulations that address compliance with the DCO Core Principles applicable to registered DCOs do not impose any obligations upon exempt DCOs. The Commission did not receive any comments on this proposal. The Commission is adopting § 39.9 largely as proposed.⁴³

III. Amendments to Part 140

⁴³ Subsequent to the 2018 Proposal, the Commission amended § 39.9 in the Alternative Compliance rulemaking to take into account a DCO registered subject to alternative compliance. *See* Registration with Alternative Compliance for Non-U.S. Derivatives Clearing Organizations, 85 FR at 67171. The Commission is adding to those amendments the changes it had originally proposed in the 2018 Proposal. *See* Exemption From Derivatives Clearing Organization Registration, 83 FR at 39929.

The Commission initially proposed amendments to § 140.94(c) to delegate authority to the Director of the Division of Clearing and Risk (DCR) for all functions reserved to the Commission in proposed § 39.6, subject to certain exceptions. Specifically, the Commission did not propose to delegate its authority to grant, modify, or terminate an exemption or prescribe conditions to an exemption order. Consistent with that proposal, the Commission further proposed to supplement its delegation to DCR to include certain functions related to the modification or termination of an exemption order upon the Commission's initiative. These functions would include, but would not be limited to, sending an exempt DCO notice of an intention to modify or terminate its exemption order. However, the Commission alone would retain the authority to modify or terminate the exemption order. The Commission did not receive any comments on this proposal. The Commission is adopting the changes to § 140.94(c) as proposed.

IV. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires that agencies consider whether the regulations they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis on the impact.⁴⁴ The regulations being adopted by the Commission will affect clearing organizations. The Commission has previously established certain definitions of "small entities" to be used by the Commission in evaluating the impact of its regulations on small entities in accordance with the RFA. The Commission has previously determined that clearing organizations are not small entities for the purpose of the RFA.⁴⁵ Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that

⁴⁴ 5 U.S.C. 601 *et seq.*

⁴⁵ See 66 FR 45604, 45609 (Aug. 29, 2001).

the regulations adopted herein will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA)⁴⁶ imposes certain requirements on Federal agencies (including the Commission) in connection with their conducting or sponsoring a collection of information as defined by the PRA. The regulations adopted herein would result in such a collection, as discussed below. A person is not required to respond to a collection of information unless it displays a currently valid control number issued by the Office of Management and Budget (OMB). The Commission requested a new OMB control number for the collection of information in connection with the proposal.

The Commission received one comment regarding its cost burden analysis in the preamble to the Proposal. JSCC stated in its October 2018 comment letter that the Commission's cost estimate of \$10,500⁴⁷ for an application for exemption from DCO registration substantially underestimated an applicant's costs, which JSCC stated would require a significant amount of resources to understand any legal and/or regulatory implications arising from the DCO exemption, as well as to identify any potential conflicts with the applicant's home country regulatory and supervisory frameworks. However, JSCC did not provide any estimate of what the expected cost of an application would be. As stated in the Proposal, the Commission based its cost estimate of \$10,500 for the exempt DCO application on the significantly reduced requirements as compared to a DCO registration application, which the Commission estimated would cost \$100,000. The Commission has not received any information indicating what the amount of

⁴⁶ 44 U.S.C. 3501 *et seq.*

⁴⁷ Due to minor adjustments to the burden estimate for an exempt DCO application due to consolidating the burden estimates for components of the application, the current estimated cost is \$10,000 per application.

additional costs over \$10,500 would be, nor has it revised any of the elements of the proposal that would affect the cost estimate. Therefore, the Commission is retaining the burden estimates it included in the proposal.

1. Application for Exemption from DCO Registration under § 39.6

Based on its experience in addressing petitions for exemption, the Commission anticipates receiving one application for exemption per year, and one request for termination of an exemption every three years.⁴⁸ Burden hours and costs were estimated based on existing information collections for DCO registration and reporting, adjusted to reflect the significantly lower burden of the proposed regulations. The Commission has estimated the burden hours for this collection of information as follows:

- Application for exemption, including all exhibits, supplements and amendments⁴⁹

Estimated number of respondents: 1

Estimated number of reports per respondent: 1

Average number of hours per report: 40

Estimated gross annual reporting burden: 40

- Termination of exemption

Estimated number of respondents: 1

Estimated number of reports per respondent: 0.33

Average number of hours per report: 2

Estimated gross annual reporting burden: 0.66

⁴⁸ The Commission has determined that one termination every three years is a more appropriate estimate than one per year, which was used in the information burden estimate for the 2018 Proposal.

⁴⁹ Although the 2018 Proposal included separate burden estimates for the application and for information requested by the Commission during its review, these estimates were combined in the 2019 Proposal and in this final rule. The estimated number of applications has been revised to one per year from two in the 2018 Proposal in response to the Commission's adoption of the Alternative Compliance framework, which had not been proposed at the time of the 2018 Proposal, and which provides an alternative that could lead to a reduced number of exemption applications. *See* Registration with Alternative Compliance for Non-U.S. Derivatives Clearing Organizations, 85 FR 67160 (Oct. 21, 2020). In addition, burden estimates for reporting by exempt DCOs have been updated based on recent observations of filing frequency by existing exempt DCOs.

- Notice to clearing members of termination of exemption

Estimated number of respondents: 1

Estimated number of reports per respondent: 8

Average number of hours per report: 0.1

Estimated gross annual reporting burden: 0.8

2. Reporting by Exempt DCOs

The number of respondents for the daily and quarterly reporting and annual certification requirements is conservatively estimated at a maximum of seven, based on the number of existing exempt DCOs (4) and one application for exemption each year. Reporting of specific events is expected to occur infrequently, and the estimated number of respondents reflects that not all exempt DCOs will experience events subject to the notification requirement:

- Daily reporting

Estimated number of respondents: 7

Estimated number of reports per respondent: 250

Average number of hours per report: 0.1

Estimated gross annual reporting burden: 175

- Quarterly reporting

Estimated number of respondents: 7

Estimated number of reports per respondent: 4

Average number of hours per report: 1

Estimated gross annual reporting burden: 28

- Event-specific reporting

Estimated number of respondents: 4

Estimated number of reports per respondent: 1

Average number of hours per report: 0.5

Estimated gross annual reporting burden: 2

- Annual certification

Estimated number of respondents: 7

Estimated number of reports per respondent: 1

Average number of hours per report: 1.5

Estimated gross annual reporting burden: 10.5

3. Reporting by Exempt DCOs in accordance with Part 45

Regulation 39.6(d) requires an exempt DCO to report data regarding the two swaps resulting from the novation of an original swap to an SDR, if the original swap had been reported to an SDR pursuant to part 45 of the Commission's regulations. The Commission is revising the information collection for part 45 to include a separate information collection under OMB Control No. 3038-0096. The burden for exempt DCOs reporting in accordance with part 45 is estimated to be approximately one-fifth of the burden for registered DCOs because exempt DCOs will not be required to report all swaps, only those that result from the novation of original swaps that have been reported to an SDR. Consequently, the burden hours for the collection of information in this rulemaking have been estimated as follows:

- Reporting in accordance with part 45

Estimated number of respondents: 7

Estimated number of reports per respondent: 8074⁵⁰

Average number of hours per report: 0.1

Estimated gross annual reporting burden: 5649

C. *Cost-Benefit Considerations*

⁵⁰ While updating the number of reports based on recent data, the Commission discovered that the estimated number in the NPRM – 1987 – inadvertently reflected a quarterly, rather than annual, number of reports. The estimate of 8074 reports per respondent represents the median number of swaps reported to SDRs by existing exempt DCOs during calendar year 2019.

1. Introduction

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain orders.⁵¹ Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors.

The baseline for the Commission's consideration of the costs and benefits of this rulemaking are: (1) the DCO Core Principles; (3) the general provisions applicable to registered DCOs under subparts A and B of part 39; (4) Form DCO in Appendix A to part 39; and (5) part 40 of the Commission's regulations.

This rulemaking codifies certain conditions and procedures that the Commission has been using to grant exemptions from DCO registration, with some modifications. To the extent that exemptions from DCO registration were already available to non-U.S. clearing organizations pursuant to these conditions and procedures, the actual costs and benefits of this rulemaking will likely be lower than the costs and benefits relative to the baseline.

The Commission notes that this consideration is based on its understanding that the swaps market functions internationally with (1) transactions that involve U.S. firms occurring across different international jurisdictions; (2) some entities organized outside of the United States that are prospective Commission registrants; and (3) some entities that typically operate both within and outside the United States and that follow

⁵¹ 7 U.S.C. 19(a).

substantially similar business practices wherever located. Where the Commission does not specifically refer to matters of location, the discussion of costs and benefits below refers to the effects of the final rule on all relevant swaps activity, whether based on their actual occurrence in the United States or on their connection with activities in, or effect on, U.S. commerce pursuant to section 2(i) of the CEA.⁵²

The Commission recognizes that the final rule may impose costs. The Commission has endeavored to assess the expected costs and benefits of the final rule in quantitative terms, including PRA-related costs, where possible. In situations where the Commission is unable to quantify the costs and benefits, the Commission identifies and considers the costs and benefits of the applicable regulations in qualitative terms. The lack of data and information to estimate those costs is attributable in part to the nature of these final regulations. Additionally, the initial and recurring compliance costs for any particular exempt DCO will depend on the size, existing infrastructure, level of clearing activity, practices, and cost structure of the DCO.

Finally, the costs and benefits of this final rule may be affected by the Alternative Compliance framework⁵³ under which a non-U.S. clearing organization or an already registered non-U.S. DCO would have the option of applying for registration with alternative compliance, which would allow the DCO to comply with the DCO Core Principles through its home country regulatory regime. The Commission has compared these costs and benefits below.

2. Amendments to Part 39

a. Summary

⁵² Pursuant to section 2(i) of the CEA, activities outside of the United States are not subject to the swap provisions of the CEA, including any rules prescribed or regulations promulgated thereunder, unless those activities either have a direct and significant connection with activities in, or effect on, commerce of the United States; or contravene any rule or regulation established to prevent evasion of a CEA provision enacted under the Dodd-Frank Act, Pub. L. 111–203, 124 Stat. 1376. 7 U.S.C. 2(i).

⁵³ Registration with Alternative Compliance for Non-U.S. Derivatives Clearing Organizations, 85 FR 67160 (Oct. 21, 2020).

Section 5b(h) of the CEA permits the Commission to exempt a non-U.S. clearing organization from DCO registration for the clearing of swaps to the extent that the Commission determines that such clearing organization is subject to comparable, comprehensive supervision by appropriate government authorities in the clearing organization's home country. Pursuant to this authority, the Commission has exempted four non-U.S. clearing organizations from DCO registration. The final rule generally codifies the policies and procedures that the Commission has followed with respect to granting exemptions from DCO registration. Specifically, these regulations set forth the process by which a non-U.S. clearing organization may obtain an exemption from DCO registration for the clearing of proprietary swaps for U.S. persons provided that it meets the specified eligibility standards and can meet the conditions of an exemption.

b. Benefits and Costs

With the Commission's adoption of this final rule, non-U.S. clearing organizations seeking to clear swaps for U.S. persons on a proprietary basis will have a choice between seeking an exemption from DCO registration and registering as a DCO, either under the Commission's original framework or the recently adopted Alternative Compliance framework. The Commission expects exemption from registration to be the least costly of the three options. The Commission estimates that it would take about 421 hours to prepare a traditional application for DCO registration⁵⁴ and 100 hours to prepare an application under the alternative procedures, as compared to 40 hours to prepare an application for an exemption.⁵⁵ The daily, quarterly, and event-specific reporting requirements are estimated to impose the same hourly burden for both registered and exempt DCOs with the exception of swap data reporting under part 45. Registered DCOs

⁵⁴ See Derivatives Clearing Organization General Provisions and Core Principles, 85 FR 4800, 4829 (Jan. 27, 2020).

⁵⁵ To the extent that current procedures for seeking an exemption from DCO registration are similar to the procedures adopted in this release, these costs are currently being incurred.

subject to Alternative Compliance will be subject to the same part 45 reporting requirements as other registered DCOs, while exempt DCOs will only have to report data regarding the two swaps resulting from the novation of an original swap previously reported to an SDR. In the PRA section for this release, the Commission estimates that the part 45 reporting burden for an exempt DCO would be about one fifth as much as the burden on a registered DCO. Both exempt DCOs and registered DCOs subject to Alternative Compliance are primarily subject to their home country regulatory regimes, but registered DCOs subject to Alternative Compliance will also be held to certain requirements set forth in the CEA and Commission regulations, including, for example, subpart A of part 39 and § 39.15. The extent to which these additional requirements will increase costs on registered DCOs subject to Alternative Compliance relative to the costs to exempt DCOs will depend on the extent to which these requirements exceed the legal requirements of their home countries and whether registered DCOs subject to Alternative Compliance have to change their practices more than they would if they had sought an exemption instead.

Given the lower costs of an exemption as compared to registration, and the greater clarity and regulatory certainty resulting from codification of the CFTC's existing procedures, the final regulation may promote competition among registered and exempt DCOs by encouraging more clearing organizations to seek an exemption. Lower costs and competition may, in turn, result in clearing members incurring lower costs to clear through exempt DCOs. In addition, access to more clearing organizations may also encourage voluntary clearing of swaps that are not required to be cleared, as certain swaps may not be cleared by any registered DCOs. This may, in turn, serve to diversify the potential risk of cleared swaps, because any such risk would become less concentrated if a larger number of registered and exempt DCOs were clearing swaps for

U.S. persons, and the volume of those swaps could become more evenly distributed among those registered and exempt DCOs.

While an exemption from DCO registration would be less costly to obtain than any form of DCO registration, registration provides benefits that are not available to exempt DCOs or persons that clear through an exempt DCO. For example, a registered DCO is permitted to clear for U.S. customers. An eligible clearing organization may choose to register, particularly under the Alternative Compliance framework, over seeking an exemption if it determines that the benefits of customer clearing (including an enhanced ability to attract U.S. business) would justify the extra costs of registration relative to an exemption. Based on data submitted by registered DCOs to the Commission pursuant to § 39.19(c), customer clearing typically accounts for a majority of the initial margin at a DCO (about 70 percent on average), and this is likely true for other clearing organizations as well. Thus, the inability of exempt DCOs to clear for U.S. customers may create a significant disincentive to seeking exemption in lieu of registration.

Registered DCOs may face a competitive disadvantage as a result of the final rule. A registered DCO may have to compete with an exempt DCO for U.S. proprietary swap business, yet may have higher ongoing compliance costs than an exempt DCO. This competitive disadvantage is mitigated by the fact that exempt DCOs are, as a precondition of such exemption, required to be subject to comparable, comprehensive supervision and regulation by a home country regulator that is likely to impose costs similar to those associated with Commission regulation.

The Commission is codifying in § 39.6(a)(1) the statutory authority in section 5b(h) of the CEA that the Commission may exempt a clearing organization from DCO registration for the clearing of swaps provided that the Commission determines that the clearing organization is subject to comparable, comprehensive supervision and regulation

by a home country regulator. To satisfy this standard, the clearing organization will need to demonstrate, among other things, that: (i) it is organized in a jurisdiction in which a home country regulator applies to the clearing organization, on an ongoing basis, statutes, rules, regulations, and/or policies that, taken together, are consistent with the PFMI; and (ii) it observes the PFMI in all material respects. New § 39.6(b)(6) requires an annual certification that an exempt DCO continues to observe the PFMI in all material respects.

The Commission believes that the PFMI provide numerous regulatory benefits and promote the protection of market participants and the public, the financial integrity of derivatives markets, and sound risk management practices. In this regard, the PFMI include provisions that address DCOs establishing requirements and/or procedures designed to ensure that clearing members meet their obligations to DCOs and safeguard customer funds. For example, the PFMI provide that DCOs should establish risk-related participation requirements adequate to ensure that participants meet operational, financial, and legal requirements to allow them to fulfill their obligations to DCOs. Financial requirements may include reasonable risk-related capital requirements for participants and appropriate indicators of participant creditworthiness.⁵⁶ In addition, the PFMI provide that a DCO should monitor compliance with its participation requirements on an ongoing basis through the receipt of timely and accurate information.⁵⁷ The PFMI further provide that collateral belonging to customers of clearing members should be segregated from the assets of the clearing member through which the customers clear.⁵⁸ Moreover, using the PFMI may promote regulatory comity, since the PFMI represent standards that have been agreed to by the G20 and are widely used in the regulation of clearing organizations. Although the PFMI are already

⁵⁶ PFMI at Principle 18, Explanatory Note 3.18.5.

⁵⁷ *Id.* at Principle 18, Explanatory Note 3.18.8.

⁵⁸ *Id.* at Principle 14, Explanatory Note 3.14.1.

used to determine eligibility for receiving an exemption from DCO registration, the Commission believes that codifying the use of the PFMI is beneficial from the perspectives of transparency and consistency.

The Commission acknowledges, as discussed in the preamble above, that the PFMI is not identical to, nor as detailed as, part 39. Thus, market participants choosing to clear swaps through exempt DCOs may incur costs associated with forgoing certain regulatory protections that are not included in the PFMI. However, these costs are mitigated by some of the conditions of exemption set out in § 39.6(b), as discussed below, as well as other Commission regulations applicable to exempt DCOs. These conditions (including, for example, the open access provision of § 39.6(b)(2)), provide additional regulatory protections beyond those required by the PFMI. Additionally, the costs of using the PFMI (as compared to some other means of determining that a clearing organization is subject to comparable, comprehensive supervision and regulation by a home country regulator) will vary depending on the home country regulatory regime. Finally, since the PFMI is already used to determine eligibility for receiving an exemption from DCO registration, these costs are currently being realized by exempt DCOs and U.S. persons who currently clear proprietary swaps on exempt DCOs.

New § 39.6(b) contain various conditions that the Commission is imposing for the granting of exemptions from DCO registration. These conditions are consistent with those that the Commission has been imposing on exempt DCOs prior to the adoption of this rule. Therefore, the costs and benefits of these conditions are currently being incurred by exempt DCOs and U.S. persons who currently clear proprietary swaps on such DCOs.

New § 39.6(b)(2) codifies the “open access” requirements of section 2(h)(1)(B) of the CEA with respect to swaps cleared by an exempt DCO to which one or more of the

counterparties is a U.S. person.⁵⁹ Under § 39.6(b)(2), an exempt DCO is required to maintain rules providing that all such swaps with the same terms and conditions submitted to the exempt DCO for clearing are economically equivalent and may be offset with each other, to the extent that offsetting is permitted by the exempt DCO's rules. An exempt DCO is also required to maintain rules providing for non-discriminatory clearing whether a swap is executed bilaterally or is executed on or subject to the rules of an unaffiliated electronic matching platform or trade execution facility, *e.g.*, a swap execution facility. This should benefit market participants by ensuring that they are able to offset their positions to the extent that it is feasible and consistent with DCO rules and that they are not subject to discrimination based on whether or not they execute on a trading platform. The Commission believes that most or all non-U.S. clearing organizations have open access rules that comply with § 39.6(b)(2) and has received no comments suggesting otherwise. However, to the extent that a clearing organization seeking an exemption from DCO registration needs to change its rules to comply with this requirement, that clearing organization could incur costs.

New § 39.6(b)(3) requires an exempt DCO to consent to jurisdiction in the United States and designate an agent in the United States to receive notice or service of various documents issued by or on behalf of the Commission or the U.S. Department of Justice in connection with investigations or for certain other purposes. This will assist the Commission and the Department of Justice in protecting market participants and the public and will impose on exempt DCOs the minor costs associated with retaining a U.S. agent.

New §§ 39.6(b)(4) and 39.6(b)(8) are general provisions that require an exempt DCO to comply, and demonstrate compliance as requested by the Commission, with any

⁵⁹ 7 U.S.C. 2(h)(1)(B).

condition of the exempt DCO's order of exemption and to provide that the Commission may condition an exemption from DCO registration on any other facts and circumstances it deems relevant. These provisions do not provide any costs and benefits in and of themselves. The costs and benefits of any additional conditions that may be imposed pursuant to § 39.6(b)(8) can only be considered when such additional conditions are imposed.

New § 39.6(b)(5) requires an exempt DCO to promptly make all books and records related to its operation as an exempt DCO available to any Commission representative upon request. This provision will facilitate the Commission's mission, including the protection of market participants and the public. While the Commission does not anticipate making routine requests for books and records, providing or making available books and records pursuant to any such request will impose modest costs on exempt DCOs.

New § 39.6(b)(7) requires an exempt DCO's home country regulator to provide an annual certification that the exempt DCO is in good regulatory standing. That rule, along with § 39.6(a)(2) which requires an MOU or similar arrangement to be in effect between the Commission and the home country regulator, will assist the Commission in protecting market participants and the public, but will not impose any direct costs on exempt DCOs or market participants. Where no MOU between the Commission and a home country regulator is in effect, a clearing organization in that country wanting an exemption may incur costs associated with facilitating such an MOU, or it could incur the costs of either registering with the Commission or forgoing U.S. participation. The requirements regarding an MOU also exist in current procedures, so the costs and benefits of those requirements are currently being realized by exempt DCOs and U.S. persons who currently clear proprietary swaps on exempt DCOs.

Finally, new § 39.6(d) requires an exempt DCO to report swap data for the two cleared swaps that result from the novation of an original swap cleared through the exempt DCO. An exempt DCO would also need to report the termination of the original swap to the SDR that received the swap data for the original swap. To avoid duplicative reporting, the exempt DCO is also required to have rules that prohibit the part 45 reporting of the two new swaps by the counterparties to the original swap. CCP12 commented that transparency in the swaps markets, which is supported by SDR reporting, provides a number of benefits. However, CCP12 argued that the SDR reporting requirements would post significant operational challenges, such as onboarding with an SDR that has a different reporting format than that of the exempt DCO's home country. CCP12 also commented that SDR reporting fees would be a burden based on the number of reported transactions. The Commission agrees that SDR reporting enhances market transparency and thus provides benefits to the market. The Commission notes that SDR reporting costs would otherwise be borne by the counterparties to the swap, and because there are far more swap counterparties than exempt DCOs, it would be more efficient to require the relatively few exempt DCOs to bear the operational burdens of setting up and following reporting processes and procedures with the various SDRs. The costs and benefits of the reporting requirements are currently being realized to the extent that similar requirements are contained in existing orders of exemption for DCOs.

3. Section 15(a) Factors

a. Protection of Market Participants and the Public

For the most part, the final rule does not materially reduce the protections available to market participants and the public because, among other things, it: (i) only permits exempt DCOs to clear swaps for U.S. persons for their proprietary accounts, and not for customers; (ii) requires that an exempt DCO be subject to comparable, comprehensive supervision and regulation by a home country regulator as provided by

the PFMI; (iii) requires an MOU or similar arrangement with the home country regulator that would enable the Commission to obtain any information that the Commission deems necessary to evaluate the initial and continued eligibility of the DCO for exemption from registration or to review its compliance with any conditions of such exemption; (iv) provides additional protections with the conditions of exemption set out in § 39.6(b), including open access and data reporting requirements; and (v) explicitly authorizes the Commission to modify or terminate an order of exemption on its own initiative if it determines that there are changes to or omissions in material facts or circumstances pursuant to which the order of exemption was issued, or that any of the terms and conditions of the order of exemption have not been met. Collectively, these provisions protect market participants and the public by ensuring that exempt DCOs are subject to the internationally recognized PFMI. Although the Commission acknowledges the possibility that some foreign regulatory regimes may ultimately prove to be less effective than that of the United States, the Commission believes that this risk is mitigated for the reasons discussed above.

b. Efficiency, Competitiveness, and Financial Integrity

The final rule promotes operational efficiency by permitting exempt DCOs to clear swaps for U.S. persons without having to apply for DCO registration, which involves the submission of extensive documentation to the Commission. The final rule also mitigates duplicative compliance requirements by not requiring exempt DCOs to comply with the Commission's part 39 regulations (with the exception of § 39.6) in addition to the requirements of their home country regulator. In addition, adopting these regulations might prompt other regulators to adopt similar rules that would defer to the Commission in the regulation of U.S. registered DCOs operating outside the United States, which could increase competitiveness by reducing the regulatory burdens on such DCOs.

The exempt DCO framework may also promote competition for U.S. proprietary business among non-U.S. clearing organizations because it holds exempt DCOs to the internationally recognized standards set forth in the PFMI. This will allow such clearing organizations to compete with each other for the proprietary business of U.S. clearing members under their own comparable regulatory regimes, which may potentially increase the number of DCOs available to clear for U.S. persons. The final rule is expected to maintain the financial integrity of swap transactions cleared by exempt DCOs because such DCOs are subject to supervision and regulation by their home country regulator within a legal framework that is comparable to that applicable to registered DCOs under the CEA and Commission regulations and as comprehensive. In addition, the final rule may contribute to the financial integrity of the broader financial system by spreading the potential risk of particular swaps among a greater number of registered and exempt DCOs, thus reducing concentration risk.

c. Price Discovery

Price discovery is the process of determining the price level for an asset through the interaction of buyers and sellers and based on supply and demand conditions. The Commission has not identified any impact of the final rule on price discovery. This is because price discovery occurs before a transaction is submitted for clearing through the interaction of bids and offers on a trading system or platform, or in the over-the-counter market. The final rule does not impact requirements under the CEA or Commission regulations regarding price discovery.

d. Sound Risk Management Practices

The exempt DCO framework encourages sound risk management practices because exempt DCOs are subject to the risk management standards set forth in the PFMI, which are comparable to standards imposed on registered DCOs.

e. Other Public Interest Considerations

The Commission notes the public interest in access to clearing organizations outside of the United States in light of the international nature of many swap transactions. The final rule codifies the exemption process for non-U.S. clearing organizations that will permit them to clear swap transactions for U.S. persons on a proprietary basis when such clearing organizations meet the eligibility requirements and conditions included therein, thus promoting transparency and consistency. Furthermore, the final rule might encourage international comity by deferring, under certain conditions, to regulators in other jurisdictions in the oversight of non-U.S. clearing organizations. The Commission expects that such regulators will defer to the Commission in the supervision and regulation of registered DCOs organized in the United States, thereby reducing the regulatory and compliance burdens to which such DCOs are subject.

4. Consideration of Alternatives

The final rule does not permit U.S. customers to clear through exempt DCOs. As the Commission noted in the 2018 Proposal, there is uncertainty as to how swaps customer funds would be treated under the U.S. Bankruptcy Code if the customer's swaps are cleared at an exempt DCO.⁶⁰ However, the Commission did request comment as to whether the Commission should consider permitting an exempt DCO to clear swaps for U.S. customers.⁶¹

In response, three commenters expressed support. ISDA stated that it “strongly believes” that the Commission should permit exempt DCOs to clear swaps for customers. ASX argued that it would be beneficial to allow U.S. customers to access the broadest possible range of clearing organizations, which would provide them with flexibility and choice in accessing the best commercial solutions for the products that they use. JSCC recommended that the Commission consider allowing U.S. customers to access exempt

⁶⁰ 2018 Proposal, 83 FR at 39926.

⁶¹ 2018 Proposal, 83 FR at 39930.

DCOs through non-U.S. clearing members that are not required to register as an FCM, as long as those non-U.S. clearing members can demonstrate that they are properly supervised, regulated, and licensed to provide customer clearing services in their home countries, and if the home regulatory authority maintains appropriate cooperative arrangements with the Commission.

Similarly, in response to the 2019 Proposal, several commenters, including ASX, FIA, SIFMA, JSCC, and CCP12, proposed a regime for swaps similar to that for futures, including a clearing structure in which a U.S. customer clears through an FCM that maintains the U.S. customer's positions and margin in a customer omnibus account held by a non-U.S. clearing member that is not registered as an FCM. The commenters argued that such a regime could potentially provide new business opportunities to FCMs while allowing customers to save money and improve efficiency by using the same FCMs to clear at both registered and exempt DCOs. This would permit customers to avoid the time and expense of executing documentation with multiple intermediaries, for example, and to realize operational efficiencies such as netting and offsetting within a single intermediary, receiving fewer position statements, and managing fewer cash transfers. The commenters noted that customers would also benefit from the various customer protections required of FCMs, such as those pertaining to disclosure, net capital, and reporting.

The Commission notes that, based on data submitted pursuant to § 39.19(c), as of October 2020, approximately 70 percent of initial margin at registered DCOs was in customer accounts, with the remainder in house (proprietary) accounts. It is likely that the majority of initial margin at exempt DCOs or clearing organizations that may seek an exemption is also in customer accounts. Thus, limiting clearing by U.S. persons at exempt DCOs to proprietary swaps will likely significantly reduce the number of U.S. persons who can benefit from clearing at exempt DCOs and may reduce the incentive for

eligible clearing organizations to seek exemption.⁶² However, there is uncertainty as to the extent to which U.S. customers would be protected under the Bankruptcy Code in the event of an FCM bankruptcy proceeding. The Commission is not adopting these alternatives at this time, but continues to weigh these risks against the potential benefits to U.S. customers and FCMs.

D. Antitrust Considerations

Section 15(b) of the CEA requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the purposes of the CEA, in issuing any order or adopting any Commission rule or regulation.⁶³

The Commission believes that the public interest to be protected by the antitrust laws is the promotion of competition. The Commission requested, but did not receive, any comments on whether the proposed rulemaking implicated any other specific public interest to be protected by the antitrust laws. The Commission has considered the proposed rulemaking to determine whether it is anticompetitive. The Commission believes that the final rule may promote greater competition in swap clearing because it might encourage more non-U.S. clearing organizations to seek an exemption from registration to clear the same types of swaps for U.S. persons that are currently cleared by registered DCOs.

The Commission has not identified any less anticompetitive means of achieving the purposes of the CEA. The Commission requested, but did not receive, any comments on whether there are less anticompetitive means of achieving the relevant purposes of the CEA that would otherwise be served by adopting the final rule.

⁶² Clearing organizations could be incentivized to seek DCO registration instead, either under the Commission's original framework or the recently adopted Alternative Compliance framework.

⁶³ 7 U.S.C. 19(b).

List of Subjects

17 CFR Part 39

Clearing, Derivatives clearing organization, Exemption, Procedures, Registration, Swaps.

17 CFR Part 140

Authority delegations (Government agencies), Organization and functions (Government agencies).

For the reasons stated in the preamble, the Commodity Futures Trading Commission amends 17 CFR chapter I as follows:

PART 39—DERIVATIVES CLEARING ORGANIZATIONS

1. The authority citation for part 39 continues to read as follows:

Authority: 7 U.S.C. 2, 6(c), 7a-1, and 12a(5); 12 U.S.C. 5464; 15 U.S.C. 8325; Section 752 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, title VII, sec. 752, July 21, 2010, 124 Stat. 1749.

2. Revise § 39.1 to read as follows:

§ 39.1 Scope.

The provisions of this subpart A apply to any derivatives clearing organization, as defined under section 1a(15) of the Act and § 1.3 of this chapter, that is registered or is required to register with the Commission as a derivatives clearing organization pursuant to section 5b(a) of the Act, or that is applying for an exemption from registration pursuant to section 5b(h) of the Act.

3. In § 39.2, add definitions of the terms “Exempt derivatives clearing organization,” “Home country,” “Home country regulator,” and “Principles for Financial Market Infrastructures,” in alphabetical order, and amend the definition of “Good regulatory standing,” to read as follows:

§ 39.2 Definitions.

* * * * *

Exempt derivatives clearing organization means a derivatives clearing organization that the Commission has exempted from registration under section 5b(a) of the Act, pursuant to section 5b(h) of the Act and § 39.6.

* * * * *

Good regulatory standing means, with respect to a derivatives clearing organization that is organized outside of the United States, and is licensed, registered, or otherwise authorized to act as a clearing organization in its home country, that:

(1) In the case of an exempt derivatives clearing organization, either there has been no finding by the home country regulator of material non-observance of the Principles for Financial Market Infrastructures or other relevant home country legal requirements, or there has been a finding by the home country regulator of material non-observance of the Principles for Financial Market Infrastructures or other relevant home country legal requirements but any such finding has been or is being resolved to the satisfaction of the home country regulator by means of corrective action taken by the derivatives clearing organization; or

(2) In the case of a derivatives clearing organization registered subject to compliance with subpart D of this part, either there has been no finding by the home country regulator of material non-observance of the relevant home country legal requirements, or there has been a finding by the home country regulator of material non-observance of the relevant home country legal requirements but any such finding has been or is being resolved to the satisfaction of the home country regulator by means of corrective action taken by the derivatives clearing organization.

Home country means, with respect to a derivatives clearing organization that is organized outside of the United States, the jurisdiction in which the derivatives clearing organization is organized.

Home country regulator means, with respect to a derivatives clearing organization that is organized outside of the United States, an appropriate government authority which licenses, regulates, supervises, or oversees the derivatives clearing organization's clearing activities in the home country.

* * * * *

Principles for Financial Market Infrastructures means the Principles for Financial Market Infrastructures jointly published by the Committee on Payment and Settlement Systems and the Technical Committee of the International Organization of Securities Commissions in April 2012.

* * * * *

4. Add § 39.6 to read as follows:

§ 39.6 Exemption from derivatives clearing organization registration.

(a) *Eligibility for exemption.* A derivatives clearing organization that is organized outside of the United States shall be eligible for an exemption from registration as a derivatives clearing organization for the clearing of swaps for U.S. persons, and thereby exempt from compliance with provisions of the Act and Commission regulations applicable to derivatives clearing organizations, if:

(1) The derivatives clearing organization is subject to comparable, comprehensive supervision and regulation by a home country regulator as demonstrated by the following:

(i) The derivatives clearing organization is organized in a jurisdiction in which a home country regulator applies to the derivatives clearing organization, on an ongoing basis, statutes, rules, regulations, policies, or a combination thereof that, taken together, are consistent with the Principles for Financial Market Infrastructures;

(ii) The derivatives clearing organization observes the Principles for Financial Market Infrastructures in all material respects; and

(iii) The derivatives clearing organization is in good regulatory standing in its home country; and

(2) A memorandum of understanding or similar arrangement satisfactory to the Commission is in effect between the Commission and the derivatives clearing organization's home country regulator, pursuant to which, among other things, the home country regulator agrees to provide to the Commission any information that the Commission deems necessary to evaluate the initial and continued eligibility of the derivatives clearing organization for exemption from registration or to review its compliance with any conditions of such exemption.

(b) *Conditions of exemption.* An exemption from registration as a derivatives clearing organization shall be subject to any conditions the Commission may prescribe including, but not limited to:

(1) *Clearing by or for U.S. persons and futures commission merchants.* The exempt derivatives clearing organization shall have rules that limit swaps clearing services for U.S. persons and futures commission merchants to the following circumstances:

(i) A U.S. person that is a clearing member of the exempt derivatives clearing organization may clear swaps for itself and those persons identified in the definition of "proprietary account" set forth in § 1.3 of this chapter;

(ii) A non-U.S. person that is a clearing member of the exempt derivatives clearing organization may clear swaps for any affiliated U.S. person identified in the definition of "proprietary" account set forth in § 1.3 of this chapter; and

(iii) An entity that is registered with the Commission as a futures commission merchant may be a clearing member of the exempt derivatives clearing organization, or otherwise maintain an account with an affiliated broker that is a clearing member, for the

purpose of clearing swaps only for itself and those persons identified in the definition of “proprietary account” set forth in § 1.3 of this chapter; and

(2) *Open access.* The exempt derivatives clearing organization shall have rules with respect to swaps to which one or more of the counterparties is a U.S. person that shall:

(i) Provide that all swaps with the same terms and conditions, as defined by product specifications established under the exempt derivatives clearing organization’s rules, submitted to the exempt derivatives clearing organization for clearing are economically equivalent within the exempt derivatives clearing organization and may be offset with each other within the exempt derivatives clearing organization, to the extent offsetting is permitted by the exempt derivatives clearing organization’s rules; and

(ii) Provide that there shall be non-discriminatory clearing of a swap executed bilaterally or on or subject to the rules of an unaffiliated electronic matching platform or trade execution facility.

(3) *Consent to jurisdiction; designation of agent for service of process.* The exempt derivatives clearing organization shall:

(i) Consent to jurisdiction in the United States;

(ii) Designate, authorize, and identify to the Commission, an agent in the United States who shall accept any notice or service of process, pleadings, or other documents, including any summons, complaint, order, subpoena, request for information, or any other written or electronic documentation or correspondence issued by or on behalf of the Commission or the United States Department of Justice to the exempt derivatives clearing organization, in connection with any actions or proceedings brought against, or investigations relating to, the exempt derivatives clearing organization or any U.S. person or futures commission merchant that is a clearing member, or that clears swaps through a clearing member, of the exempt derivatives clearing organization; and

(iii) Promptly inform the Commission of any change in its designated and authorized agent.

(4) *Compliance.* The exempt derivatives clearing organization shall comply, and shall demonstrate compliance as requested by the Commission, with any condition of its exemption.

(5) *Inspection of books and records.* The exempt derivatives clearing organization shall make all documents, books, records, reports, and other information related to its operation as an exempt derivatives clearing organization open to inspection and copying by any representative of the Commission; and in response to a request by any representative of the Commission, the exempt derivatives clearing organization shall, promptly and in the form specified, make the requested books and records available and provide them directly to Commission representatives.

(6) *Observance of the Principles for Financial Market Infrastructures.* On an annual basis, within 60 days following the end of its fiscal year, the exempt derivatives clearing organization shall provide to the Commission a certification that it continues to observe the Principles for Financial Market Infrastructures in all material respects. To the extent the exempt derivatives clearing organization is unable to provide to the Commission an unconditional certification, it must identify the underlying material non-observance of the Principles for Financial Market Infrastructures and identify whether and how such non-observance has been or is being resolved by means of corrective action taken by the exempt derivatives clearing organization.

(7) *Representation of good regulatory standing.* On an annual basis, within 60 days following the end of its fiscal year, an exempt derivatives clearing organization shall request and the Commission must receive from a home country regulator a written representation that the exempt derivatives clearing organization is in good regulatory standing.

(8) *Other conditions.* The Commission may condition an exemption on any other facts and circumstances it deems relevant.

(c) *General reporting requirements.* (1) An exempt derivatives clearing organization shall provide to the Commission the information specified in this paragraph and any other information that the Commission deems necessary, including, but not limited to, information for the purpose of the Commission evaluating the continued eligibility of the exempt derivatives clearing organization for exemption from registration, reviewing compliance by the exempt derivatives clearing organization with any conditions of the exemption, or conducting oversight of U.S. persons and their affiliates, and the swaps that are cleared by such persons through the exempt derivatives clearing organization. Information provided to the Commission under this paragraph shall be submitted in accordance with § 39.19(b).

(2) Each exempt derivatives clearing organization shall provide to the Commission the following information:

(i) A report compiled as of the end of each trading day and submitted to the Commission by 10:00 a.m. U.S. Central time on the following business day, containing:

(A) Initial margin requirements and initial margin on deposit for each U.S. person, with respect to swaps, *provided however* if a clearing member margins on a portfolio basis its own positions and the positions of its affiliates, and either the clearing member or any of its affiliates is a U.S. person, the exempt derivatives clearing organization shall report initial margin on deposit for all such positions on a combined basis for each such clearing member; and

(B) Daily variation margin, separately listing the mark-to-market amount collected from or paid to each U.S. person, with respect to swaps; *provided, however*, if a clearing member margins on a portfolio basis its own positions and the positions of its affiliates, and either the clearing member or any of its affiliates is a U.S. person, the

exempt derivatives clearing organization shall separately list the mark-to-market amount collected from or paid to each such clearing member, on a combined basis.

(ii) A report compiled as of the last day of each fiscal quarter of the exempt derivatives clearing organization and submitted to the Commission no later than 17 business days after the end of the exempt derivatives clearing organization's fiscal quarter, containing:

(A) The aggregate clearing volume of U.S. persons during the fiscal quarter, with respect to swaps. If a clearing member is a U.S. person, the volume figure shall include the transactions of the clearing member and all affiliates. If a clearing member is not a U.S. person, the volume figure shall include only transactions of affiliates that are U.S. persons.

(B) The average open interest of U.S. persons during the fiscal quarter, with respect to swaps. If a clearing member is a U.S. person, the open interest figure shall include the positions of the clearing member and all affiliates. If a clearing member is not a U.S. person, the open interest figure shall include only positions of affiliates that are U.S. persons.

(C) A list of U.S. persons and futures commission merchants that are either clearing members or affiliates of any clearing member, with respect to the clearing of swaps, as of the last day of the fiscal quarter.

(iii) Prompt notice regarding any change in the home country regulatory regime that is material to the exempt derivatives clearing organization's continuing observance of the Principles for Financial Market Infrastructures or compliance with any of the requirements set forth in this section or in the order of exemption issued by the Commission;

(iv) As available to the exempt derivatives clearing organization, any assessment of the exempt derivatives clearing organization's or the home country regulator's

observance of the Principles for Financial Market Infrastructures, or any portion thereof, by a home country regulator or other national authority, or an international financial institution or international organization;

(v) As available to the exempt derivatives clearing organization, any examination report, examination findings, or notification of the commencement of any enforcement or disciplinary action by a home country regulator;

(vi) Immediate notice of any change with respect to the exempt derivatives clearing organization's licensure, registration, or other authorization to act as a derivatives clearing organization in its home country;

(vii) In the event of a default by a U.S. person or futures commission merchant clearing swaps, with such event of default determined in accordance with the rules of the exempt derivatives clearing organization, immediate notice of the default including the name of the U.S. person or futures commission merchant clearing swaps, a list of the positions held by the U.S. person or futures commission merchant, and the amount of the U.S. person's or futures commission merchant's financial obligation; and

(viii) Notice of action taken against a U.S. person or futures commission merchant clearing swaps by an exempt derivatives clearing organization, no later than two business days after the exempt derivatives clearing organization takes such action against a U.S. person or futures commission merchant.

(d) *Swap data reporting requirements.* If an exempt derivatives clearing organization accepts for clearing a swap that has been reported to a swap data repository pursuant to part 45 of this chapter, the exempt derivatives clearing organization shall report to a swap data repository data regarding the two swaps resulting from the novation of the original swap. The exempt derivatives clearing organization shall also report the termination of the original swap to the swap data repository to which the original swap was reported. In order to avoid duplicative reporting for such transactions, the exempt

derivatives clearing organization shall have rules that prohibit the reporting, pursuant to part 45 of this chapter, of the two new swaps by the counterparties to the original swap.

(e) *Application procedures.* (1) An entity seeking to be exempt from registration as a derivatives clearing organization shall file an application for exemption with the Secretary of the Commission in the format and manner specified by the Commission. The Commission will review the application for exemption and may approve or deny the application or, if deemed appropriate, exempt the applicant from registration as a derivatives clearing organization subject to conditions in addition to those set forth in paragraph (b) of this section.

(2) *Application.* An applicant for exemption from registration as a derivatives clearing organization shall submit to the Commission the information and documentation described in this section. Such information and documentation shall be clearly labeled as outlined in this section. The Commission will not commence processing an application unless the applicant has filed a complete application. Upon its own initiative, an applicant may file with its completed application for exemption additional information that may be necessary or helpful to the Commission in processing the application. The application shall include:

(i) A cover letter containing the following information:

(A) Exact name of applicant as specified in its charter, and the name under which business will be conducted (including acronyms);

(B) Address of applicant's principal office;

(C) List of principal office(s) and address(es) where clearing activities are/will be conducted;

(D) A list of all regulatory licenses or registrations of the applicant (or exemptions from any licensing requirement) and the regulator granting such license or registration;

(E) Date of the applicant's fiscal year end;

(F) Contact information for the person or persons to whom the Commission should address questions and correspondence regarding the application; and

(G) A signature and date by a duly authorized representative of the applicant.

(ii) A description of the applicant's business plan for providing clearing services as an exempt derivatives clearing organization, including information as to the classes of swaps that will be cleared and whether the swaps are subject to a clearing requirement issued by the Commission or the applicant's home country regulator;

(iii) Documents that demonstrate that the applicant is organized in a jurisdiction in which its home country regulator applies to the applicant, on an ongoing basis, statutes, rules, regulations, policies, or a combination thereof that, taken together, are consistent with the Principles for Financial Market Infrastructures;

(iv) A written representation from the applicant's home country regulator that the applicant is in good regulatory standing;

(v) Copies of the applicant's most recent disclosures that are necessary to observe the Principles for Financial Market Infrastructures, including the financial market infrastructure disclosure template set forth in Annex A to the Disclosure Framework and Assessment Methodology for the Principles for Financial Market Infrastructures, any other such disclosure framework issued under the authority of the International Organization of Securities Commissions that is required for observance of the Principles for Financial Market Infrastructures, and the URL to the specific page(s) on the applicant's website where such disclosures may be found;

(vi) A representation that the applicant will comply with each of the requirements and conditions of exemption set forth in paragraphs (b), (c), and (d) of this section, and the terms and conditions of its order of exemption as issued by the Commission;

(vii) A copy of the applicant's rules that meet the requirements of paragraphs (b)(2) and (d) of this section, as applicable; and

(viii) The applicant's consent to jurisdiction in the United States, and the name and address of the applicant's designated agent in the United States, pursuant to paragraph (b)(3) of this section.

(3) *Submission of supplemental information.* At any time during its review of the application for exemption from registration as a derivatives clearing organization, the Commission may request that the applicant submit supplemental information in order for the Commission to process the application, and the applicant shall file such supplemental information in the format and manner specified by the Commission.

(4) *Amendments to pending application.* An applicant for exemption from registration as a derivatives clearing organization shall promptly amend its application if it discovers a material omission or error, or if there is a material change in the information provided to the Commission in the application or other information provided in connection with the application.

(5) *Public information.* The following sections of an application for exemption from registration as a derivatives clearing organization will be public: the cover letter set forth in paragraph (e)(2)(i) of this section; the documentation required in paragraphs (e)(2)(iii) and (e)(2)(v) of this section; rules that meet the requirements of paragraphs (b)(2) and (d) of this section, as applicable; and any other part of the application not covered by a request for confidential treatment, subject to § 145.9 of this chapter.

(f) *Modification or termination of exemption upon Commission initiative.* (1) The Commission may, in its discretion and upon its own initiative, terminate or modify the terms and conditions of an order of exemption from derivatives clearing organization registration if the Commission determines that there are changes to or omissions in material facts or circumstances pursuant to which the order of exemption was issued, or that any of the terms and conditions of its order of exemption have not been met, including, but not limited to, the requirement that:

(i) The exempt derivatives clearing organization observes the Principles for Financial Market Infrastructures in all material respects; or

(ii) The exempt derivatives clearing organization is subject to comparable, comprehensive supervision and regulation by its home country regulator.

(2) The Commission shall provide written notification to an exempt derivatives clearing organization that it is considering whether to terminate or modify an exemption pursuant to this paragraph and the basis for that consideration.

(3) The exempt derivatives clearing organization may respond to the notification in writing no later than 30 business days following receipt of the notification, or at such later time as the Commission permits in writing.

(4) Following receipt of a response from the exempt derivatives clearing organization, or after expiration of the time permitted for a response, the Commission may:

(i) Issue an order of termination, effective as of a date to be specified therein. Such specified date shall be intended to provide the exempt derivatives clearing organization with a reasonable amount of time to wind down its swap clearing services for U.S. persons;

(ii) Issue an amended order of exemption that modifies the terms and conditions of the exemption; or

(iii) Provide written notification to the exempt derivatives clearing organization that the exemption will remain in effect without modification to the terms and conditions of the exemption.

(g) *Termination of exemption upon request by an exempt derivatives clearing organization.* (1) An exempt derivatives clearing organization may petition the Commission to terminate its exemption if:

(i) Changed circumstances result in the exempt derivatives clearing organization no longer qualifying for an exemption;

(ii) The exempt derivatives clearing organization intends to cease clearing swaps for U.S. persons; or

(iii) In conjunction with the petition, the exempt derivatives clearing organization submits an application for registration in accordance with § 39.3(a)(2) or § 39.3(a)(3), as applicable, to become a registered derivatives clearing organization pursuant to section 5b(a) of the Act.

(2) The petition for termination of exemption shall include a detailed explanation of the facts and circumstances supporting the request and the exempt derivatives clearing organization's plans for, as may be applicable, the liquidation or transfer of the swaps positions and related collateral of U.S. persons.

(3) The Commission shall issue an order of termination within a reasonable time appropriate to the circumstances or, as applicable, in conjunction with the issuance of an order of registration.

(h) *Notice to clearing members of termination of exemption.* Following the Commission's issuance of an order of termination (unless issued in conjunction with the issuance of an order of registration), the exempt derivatives clearing organization shall provide immediate notice of such termination to its clearing members. Such notice shall include:

(1) A copy of the Commission's order of termination;

(2) A description of the procedures for orderly disposition of any open swaps positions that were cleared for U.S. persons; and

(3) An instruction to clearing members, requiring that they provide the exempt derivatives clearing organization's notice of such termination to all U.S. persons clearing swaps through such clearing members.

5. Revise § 39.9 to read as follows:

§ 39.9 Scope.

Except as otherwise provided by Commission order, the provisions of this subpart B apply to any derivatives clearing organization, as defined under section 1a(15) of the Act and § 1.3 of this chapter, that is registered with the Commission as a derivatives clearing organization pursuant to section 5b of the Act. The provisions of this subpart B do not apply to any exempt derivatives clearing organization, as defined under § 39.2.

PART 140—ORGANIZATION, FUNCTIONS, AND PROCEDURES OF THE COMMISSION

6. The authority citation for part 140 continues to read as follows:

Authority: 7 U.S.C. 2(a)(12), 12a, 13(c), 13(d), 13(e), and 16(b).

7. Amend § 140.94 by:

- a. Redesignating paragraphs (c)(4) through (13) as paragraphs (c)(5) through (14); and
- b. Adding new paragraph (c)(4).

The addition reads as follows:

§ 140.94 Delegation of authority to the Director of the Division of Swap Dealer and Intermediary Oversight and the Director of the Division of Clearing and Risk.

* * * * *

(c) * * *

(4) All functions reserved to the Commission in § 39.6 of this chapter, except for the authority to:

- (i) Grant an exemption under § 39.6(a) of this chapter;
- (ii) Prescribe conditions to an exemption under § 39.6(b) of this chapter;
- (iii) Modify or terminate an exemption under § 39.6(f)(4) of this chapter; and
- (iv) Terminate an exemption under § 39.6(g)(3) of this chapter.

* * * * *

Issued in Washington, DC, on November 25, 2020, by the Commission.

Christopher Kirkpatrick,

Secretary of the Commission.

NOTE: The following appendices will not appear in the Code of Federal Regulations.

**Appendices to Exemption from Derivatives Clearing Organization Registration –
Commission Voting Summary, Chairman’s Statement, and Commissioners’
Statements**

Appendix 1 – Commission Voting Summary

On this matter, Chairman Tarbert and Commissioners Quintenz, Behnam, Stump, and Berkovitz voted in the affirmative. No Commissioner voted in the negative.

Appendix 2 – Statement of Support of Chairman Heath P. Tarbert

We are voting to approve a rule proposed in 2018 that codifies existing staff guidance by which the CFTC exempts derivatives clearing organizations (DCOs) from registration for the clearing of swaps.¹ Pursuant to that guidance, we have exempted four clearinghouses that we determined are subject to “comparable, comprehensive supervision and regulation” by the clearing organization’s home country regulator.²

¹ See Exemption From Derivatives Clearing Organization Registration, 83 FR 39923 (Aug. 13, 2018). The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376, amended the Commodity Exchange Act (“CEA”) to permit the Commission to exempt conditionally or unconditionally a DCO from registration for the clearing of swaps if the Commission determines that the clearing organization is subject to “comparable, comprehensive supervision and regulation” by appropriate government authorities in the clearing organization’s home country. See Section 5b(a) of the CEA, 7 U.S.C. 7a-1(a).

² See Amended Order of Exemption from Registration (Jan. 28, 2016) (ASX Clear (Futures) Pty Limited), available at: <https://www.cftc.gov/sites/default/files/idc/groups/public/@otherif/documents/ifdocs/asxclearamdorderdcoe xemption.pdf>; Amended Order of Exemption from DCO Registration (May 15, 2017) (Japan Securities Clearing Corporation), available at: <https://www.cftc.gov/sites/default/files/idc/groups/public/@otherif/documents/ifdocs/jsccdcexemptamdorder5-15-17.pdf>; Order of Exemption from DCO Registration (Oct. 26, 2015) (Korea Exchange, Inc.), available at: <https://www.cftc.gov/sites/default/files/idc/groups/public/@otherif/documents/ifdocs/krxdcexemptorder10->

Codifying this framework through a notice-and-comment rulemaking is, frankly, good government. And doing so is in keeping with my recent directive on the use of staff letters and guidance, in which I noted that staff guidance and letters should supplement rulemakings, rather than themselves function as rules.³ This approach has many benefits, including providing increased transparency. It also furthers our strategic objective of enhancing the regulatory experience for market participants at home and abroad.

This rulemaking is a modest first step. As is the case in the existing staff guidance, the rule does not permit exempt DCOs to clear for U.S. customers, but rather only for proprietary swap transactions for U.S. clearing members and futures commission merchants (FCMs). It reflects the CFTC's continued efforts to foster cross-border cooperation and show deference to home country regulation that is deemed comparable to our own regulations.

In 2019, the Commission issued a supplemental proposal that would have gone further and permitted exempt DCOs to clear swaps for U.S. eligible contract participants (ECPs) through foreign intermediaries.⁴ I would have supported finalizing that proposal for two reasons. First, the proposal would have provided greater flexibility and choice to our most sophisticated U.S. customers—ECPs—to access swaps cleared at non-U.S. clearinghouses. This would have given these sophisticated counterparties access to foreign-currency denominated instruments traded overseas that would enable them to hedge their various risks on a global basis. Second, exempting clearinghouses that do not pose a substantial risk to the U.S. financial system is consistent with principles of international comity.

26-15.pdf; and Order of Exemption from DCO Registration (Dec. 21, 2015) (OTC Clearing Hong Kong Limited), available at: <https://www.cftc.gov/sites/default/files/idc/groups/public/@otherif/documents/ifdocs/otcclearedcoexemptorder12-21-15.pdf>.

³ See Directive of Chairman Heath P. Tarbert on the Use of Staff Letters and Guidance (Oct. 27, 2020), available at: <https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbetstatement102720>.

⁴ See Exemption From Derivatives Clearing Organization Registration, 84 FR 35456 (July 23, 2019).

Because we have not worked through all the issues raised by the 2019 supplemental proposal to the satisfaction of our Commission, today we are adopting only the 2018 proposal. Nonetheless, I support continued discussion on whether to permit Exempt DCOs additionally to clear certain non-U.S.-dollar denominated swaps for U.S. customers who are ECPs, either directly through foreign intermediaries or through U.S. FCMs. Although registration as a DCO—under either our traditional or recently-established alternative framework⁵—should be the preferred route for most non-U.S. clearinghouses, there are likely circumstances where U.S. customers would benefit from access to additional risk-mitigating instruments offered overseas.

⁵ See Registration With Alternative Compliance for Non-U.S. Derivatives Clearing Organizations, 85 FR 67160 (Oct. 21, 2020).

Appendix 3 – Supporting Statement of Commissioner Brian D. Quintenz

I support today's final rule to codify the CFTC's existing practice of exempting non-U.S. derivatives clearing organizations (DCOs) from registration, pursuant to a provision of the Commodity Exchange Act that allows for U.S. swap market participants to access comparably regulated foreign DCOs.¹ That provision authorizes the Commission to defer to its counterparts abroad, which I believe properly conserves the Commission's resources and enables firms to avoid duplicative regulation, while providing U.S. market participants with greater choice. I am proud that today's final rule provides yet another example of the CFTC deferring to foreign regulators that provide comparable regulation and supervision. During my tenure as a Commissioner, the CFTC has properly provided such deference in many areas, including swap dealer (SD) registration,² uncleared swap margin requirements,³ swap execution facilities (SEFs),⁴ registered DCOs,⁵ and foreign futures.⁶ Like these other actions, today's final rule holds exempt DCO to a high regulatory standard. Under the final rule, a DCO is only eligible for an exemption if its home country regulator ensures the clearinghouse complies with

¹ Sec. 5b(h) of the Commodity Exchange Act.

² Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to SDs and Major Swap Participants (MSPs), 85 FR 56924 (Sept. 14, 2020).

³ Comparability Determination for Australia: Margin Requirements for Uncleared Swaps for SDs and MSPs, 84 FR 12908 (Apr. 3, 2019); Amendment to Comparability Determination for Japan: Margin Requirements for Uncleared Swaps for SDs and MSPs, 84 FR 12074 (Apr. 1, 2019).

⁴ Amendment to Order of Exemption from SEF registration for Recognized Market Operators authorized in Singapore, Nov. 2, 2020, available at:

<https://www.cftc.gov/PressRoom/PressReleases/8301-20>;

Amendment to Order of Exemption from SEF registration for E.U. multilateral trading facilities and organized trading facilities, July 23, 2020, available at:

<https://www.cftc.gov/PressRoom/PressReleases/8211-20>;

Order of Exemption from SEF registration for Japanese derivatives trading facilities, July 11, 2019, available at:

<https://www.cftc.gov/PressRoom/PressReleases/7968-19>.

⁵ Registration with Alternative Compliance for Non-U.S. DCOs, 85 FR 67160 (Oct. 21, 2020).

⁶ Regulation 30.10 orders issued to the Bombay Stock Exchange, National Stock Exchange Int'l Financial Service Centre Ltd. [India], Montreal Exchange, NZX Ltd. [New Zealand], and UBS AG [Switzerland], Nov. 2, 2020, available at:

<https://www.cftc.gov/PressRoom/PressReleases/8300-20>.

rules consistent with the internationally accepted “Principles for Financial Market Infrastructures” (PFMIs) issued by CPMI-IOSCO.⁷ Moreover, the exempt DCO must regularly provide the CFTC with margin information concerning U.S. clearing members, among other key information.⁸

I note that under the final rule, an exempt DCO will only be authorized to clear the proprietary positions of its U.S. clearing members. I had supported and still support the Commission’s 2019 proposal that would have expanded the exempt DCO framework to allow for U.S. customers, like asset managers and insurance companies, to clear at exempt DCOs directly to better manage and hedge their risk.⁹ I continue to believe that all participants meeting the Commodity Exchange Act’s definition of “eligible contract participant”¹⁰ have the resources, sophistication, and incentives to adequately assess how customer protections provided by an exempt DCO may differ from protections established by CFTC regulations for registered DCOs. The CFTC should provide these market participants with the choice befitting their status, not only as sophisticated market participants, but as complex international organizations who need access to foreign markets, products, and a choice of liquidity pools. I hope the Commission will continue to consider the best way to expand the exempt DCO framework to allow for U.S. customer clearing.

⁷ Reg. 39.6(a)(1)(i).

⁸ Reg. 39.6(c).

⁹ Exemption from DCO Registration, 84 FR 35456 (July 23, 2019); Opening Statement of Commissioner Brian Quintenz before the Open Commission Meeting on July 11, 2019, available at: <https://www.cftc.gov/PressRoom/SpeechesTestimony/quintenzstatement071119>.

¹⁰ Sec. 1a(18) of the Commodity Exchange Act.

Appendix 4 – Concurring Statement of Commissioner Rostin Behnam

I respectfully concur with the Commodity Futures Trading Commission’s final rule regarding policies and procedures that it will follow with respect to granting exemptions from derivatives clearing organization (DCO) registration pursuant to authority under section 5b(h) of the Commodity Exchange Act (CEA)¹ (the “Final Rule”). The Final Rule, with limited exceptions, codifies the policies and procedures followed by the Commission in issuing the four exempt DCO orders which currently limit clearing organizations organized outside of the United States to clearing only proprietary swap positions of U.S. persons and futures commission merchants, and not customer positions (“exempt DCOs”). Critical to my vote today, the Final Rule prohibits the clearing of U.S. customer positions at an exempt DCO.²

I supported the Commission’s 2018 notice of proposed rulemaking³ as a means to promote transparency and accountability as well as a positive step towards increased cross-border cooperation and deference to our foreign regulatory counterparts. However, I was unable to support the Commission’s 2019 supplement to the 2018 Proposal,⁴ which proposed permitting exempt DCOs to clear swaps for U.S. customers through foreign intermediaries that would be wholly outside the Commission’s direct regulation and oversight. As articulated more fully in my dissent,⁵ the 2019 Supplemental Proposal was not the product of internal consensus and its brief history and questionable timeline signaled a lack of appropriate scrutiny and evaluation of the critical financial, market, consumer protection, and systemic risk issues raised by diverging from the customer

¹ 7 U.S.C. 7a-1(a).

² See Final Rule at II.B.2.a. and § 39.6(b)(1).

³ Exemption from Derivatives Clearing Organization Registration, 83 FR 39923 (proposed Aug. 13, 2018) (the “2018 Proposal”).

⁴ Exemption from Derivatives Clearing Organization Registration, 84 FR 35456 (proposed July 23, 2019) (the “2019 Supplemental Proposal”).

⁵ See Appendix 4—Dissenting Statement of Commissioner Rostin Behnam, Supplemental Proposal, 84 FR at 35476-35478.

protection model provided by the CEA and U.S. Bankruptcy Code. It was and remains my view that if the Commission believes it is appropriate to provide U.S. customers with greater access to non-U.S. swap markets, then we can and should engage in a more careful analysis of options, assessment of alternatives, and evaluation of consequences consistent with the Administrative Procedure Act.⁶ As the Commission is declining to adopt the 2019 Supplemental Proposal at this time, I am comfortable with supporting the Final Rule.

One area in which I will remain vigilant is with regard to the Commission's reliance on the Principles for Financial Market Infrastructures (PFMI) framework as the benchmark for making the comparability determination with respect to a foreign jurisdiction's supervisory and regulatory scheme required by CEA section 5b(h). I believe that the Commission's reliance on the PFMIs as providing a comprehensive framework for DCO supervision that is comparable to the statutory and regulatory requirements applicable to registered DCOs, with a particular focus on the DCO Core Principles,⁷ is within its discretion under CEA section 5b(h). However, I am concerned that the Commission's decision to limit its reference to the PFMIs as they existed in 2012 may lead to untenable divergence in the future should the Commission determine to incorporate subsequent amendments or revisions to the PFMIs or related interpretations and guidance into its own regulatory and supervisory DCO oversight. Alternatively, I am concerned that maintaining a static definition of the PFMIs to provide exempt DCOs with greater regulatory certainty with regard to their ongoing eligibility for the exemption could negatively impact the Commission's consideration regarding whether to adopt or incorporate future changes to the PFMIs or related interpretations and guidance into its regulatory regime. However, I am reassured that the Commission explicitly reserves the

⁶ *Id.* at 35476.

⁷ *See* CEA section 5b(c)(2), 7 U.S.C. 7a-1(c)(2).

ability to incorporate future amendments to the PFMI into the Final Rule's PFMI definition in § 39.2. As well, because the Commission also maintains broad discretion to condition an exemption on any facts and circumstances it deems relevant under new § 39.6(b)(8), I believe the Commission has clear discretion and authority to make appropriate changes with regard to its consideration of exempt DCO eligibility criteria and ongoing compliance to maintain comprehensive application of and adherence to comparable regulatory and supervisory standards.

My decision to support the Final Rule is largely based on the Commission's determination to move forward with the 2018 Proposal without adopting the 2019 Supplemental Proposal. However, I remain supportive of the Commission's endeavor to explore ways to adapt and—if appropriate—seek to adjust the current intermediary structure established under the CEA and Commission regulations to better accommodate both U.S. customer demand for increased access to clearing in foreign jurisdictions and evolving global swaps market structures. I remain open and look forward to the possibility of further discussing the regulatory and policy issues raised during this rulemaking.

Appendix 5 – Statement of Commissioner Dan M. Berkovitz

I am voting for the final rule establishing procedures for granting registration exemptions to foreign derivatives clearing organizations (“Exempt DCOs”) to clear swaps for certain U.S. persons (“Final Rule”). The Final Rule exercises the exemptive authority provided by Congress in the Commodity Exchange Act (“CEA”)¹ in a limited, pragmatic manner that will provide U.S. financial services firms that operate globally with access to foreign clearinghouses and cleared swaps in order to more effectively manage the risks arising from their global operations.

¹ Commodity Exchange Act section 5b(h).

In July of last year, I dissented from the proposed exempt DCO rule, because it also would have permitted Exempt DCOs to clear for U.S. customers, but *only* through foreign intermediaries. In doing so, the proposed rule would have subjected U.S. customer accounts to foreign bankruptcy and other regulations, promoted the use of foreign intermediaries at the expense of U.S. firms, and exceeded this agency's limited exemptive authority.² Enabling U.S. customers to clear swaps and amass large positions in non-U.S. markets in this manner would not only pose risks to those customers, but also could have presented systemic risks to the U.S. financial system.

In response to commenters who expressed similar objections, the Final Rule does not contain the concerning provisions. Neither registered FCMs nor their foreign intermediary counterparts can clear for U.S. person *customers*. With respect to clearing for U.S. persons, the Final Rule restricts clearing by an Exempt DCO to only U.S. firms that become clearing members of the Exempt DCO along with certain of their affiliates and persons associated with those firms in the manner identified in the definition of "proprietary account" in section 1.3 of our regulations. In addition, registered FCMs, including U.S. firms, can also clear at exempt DCOs, but only for themselves and persons associated with the FCMs in the manner provided in the definition of "proprietary account." These sophisticated market participants are well equipped to assess the risks of clearing swaps under the foreign regime. Furthermore, by requiring that they be members of the Exempt DCO (or clear through an affiliate that is a member), the Commission assures that such entities have taken affirmative actions to assess and accept those risks. The margin funds and related obligations of these persons must also be

² See Dissenting Statement of Commissioner Berkovitz, 84 FR 35456 at 35479 (July 23, 2019). As discussed in my prior statement, in addition to my substantive concerns, the proposed rule would have relied on CEA Section 4(c) exemptive authority to exempt non-U.S. intermediaries that provide customer clearing at Exempt DCOs from the FCM registration requirement and the regulations applicable to registered FCMs. This reliance would have exceeded the clearly limited authority granted under Section 4(c). With the elimination of customer clearing in the Final Rule, the Commission no longer needs to resort to an overly expansive reading of Section 4(c) authority to adopt the Final Rule.

segregated from customer funds held by registered FCMs thereby minimizing any impact on U.S. customers of the cleared positions at Exempt DCOs. These limitations are a reasonable, practical approach to implementing the authority provided to the Commission to exempt certain foreign DCOs without adding uncertain risk into our system of fully registered DCOs and FCMs.

Furthermore, the Commission has, on an ad hoc basis, previously granted registration exemptions to four foreign clearinghouses limited to proprietary swap positions with effectively the same conditions and limitations as provided in the Final Rule. The Final Rule will therefore maintain consistency with the existing exemptions.

The Final Rule also contains fairly detailed daily, quarterly, and annual reporting requirements, as well as special event notice requirements. These requirements allow the Commission to monitor U.S. person clearing activity at the Exempt DCO on a daily basis and keep the Commission informed of any material changes to the regulatory and financial status of the Exempt DCO in its home jurisdiction. While the Exempt DCOs will be able to operate under the compliance regime and oversight of its home country regulator, the CFTC can maintain limited, but up-to-date oversight of the activities that are relevant for U.S. market participants and that could have an impact on our financial system.

As noted above, the Final Rule does not permit registered FCMs to clear U.S. customer swaps at Exempt DCOs. In the Commission's initial 2018 proposal to establish a framework for Exempt DCOs, the Commission proposed this prohibition. The Commission explained:

Section 4d(f)(1) of the CEA makes it unlawful for any person to accept money, securities, or property (*i.e.*, funds) from a swaps customer to margin a swap cleared through a DCO unless the person is registered as an FCM. Any swaps customer funds held by a DCO are also subject to the segregation requirements of section 4d(f)(2) of the CEA, and in order for a customer to receive protection under this regime, particularly in an insolvency context, its funds must be carried by an FCM, and deposited with a registered DCO. Absent that chain of registration, the swaps

customer's funds may not be treated as customer property under the U.S. Bankruptcy Code and the Commission's regulations. Because of this, it has been the Commission's policy to allow exempt DCOs to clear only proprietary positions of U.S. persons and FCMs.³

The Final Rule notes that the Commission may revisit the prohibition on U.S. customer clearing in the future. While I agree with the outcome in the Final Rule as to customer clearing given the Commission's interpretation of CEA Section 4d(f), if the above interpretation changes, whether by a change to the statute or by other appropriate means, I could support a further amendment of the Final Rule. Any such change should place U.S. FCMs on an equal footing with their foreign counterparts when competing for U.S. customer clearing at Exempt DCOs. In addition, such a change should not create an advantage for unregistered Exempt DCOs over registered DCOs who comply with all of our regulations.

Finally, I note that CEA Section 5b(h) provides for the registration exemption if the foreign DCO is subject to "comparable, comprehensive supervision and home country regulation." Under the Final Rule, to demonstrate comparability, the DCO must be subject to home country regulations that are consistent with, and the DCO must "observe in all material respects," the "Principles for Financial Market Infrastructures"⁴ ("PFMIs") applicable to central counterparties.

Several commenters objected to this approach to comparability determinations on a number of grounds. These commenters stated that the Commission should not substitute a commitment to adhere to the PFMIs for its own examination and assessment as to the comparability and comprehensiveness of the actual foreign regulations. As the PFMIs are only general principles, even when the PFMIs are implemented, material

³ Exemption from Derivatives Clearing Organization Registration, 83 FR 39923, 39926 (proposed Aug. 13, 2018).

⁴ See Committee on Payment and Settlement Systems and the Technical Committee of the International Organization of Securities Commissions, Principles for financial market infrastructures (Apr. 2012), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD377-PFMI.pdf>.

differences may exist between the PFMI-compliant regime and the Commission's DCO core principles and regulations. Commenters further argued that Congress intended for the Commission to analyze comparability only by direct comparison to the CFTC's laws and regulations.

Over the past two years, I have expressed concerns over the erosion of the Commission's standards and role in finding comparability for various CFTC regulations. The Commission's approach has been increasingly deferential to other regulators, which has the potential to permit the importation of increased risks into the U.S. financial system.

In this regard, I too have some concerns about the use of the PFMIs as a standard for comparability. However, for the purpose of granting DCO registration exemptions, I believe the approach taken in the Final Rule is reasonable. I have consistently said that comparability determinations should involve a detailed examination of the other jurisdiction's standards, but also should be outcomes based. Regulators around the world take substantively different approaches to regulating DCOs, but that does not mean any one approach is *necessarily* better or worse than another as to its expected outcome. The PFMIs tend to be more general in nature than the DCO core principles and regulations in the CEA and CFTC regulations. However, regarding the general outcome of DCO regulation, the PFMIs – which the CFTC has contributed to and incorporated in regulation⁵ – are consistent with our DCO core principles. Furthermore, given the limited scope of the Final Rule in that it applies only to clearing of proprietary positions, using the PFMIs to find comparability is not unwarranted. Finally, the Final Rule allows for the Commission to assess the extent to which the home country regulations are

⁵ See 17 CFR 39.30, 39.40.

consistent with the PFMIs and the extent to which the applying DCO is observing the PFMIs. As such, I believe the approach taken in the Final Rule is reasonable.

In conclusion, the Final Rule creates a limited, practical set of policies and procedures for granting exemptions from registration for foreign DCOs. The Exempt DCOs can only clear swaps for U.S. persons who are proprietary traders and who are able to assess the specific risks of clearing at the Exempt DCO. The U.S. customer accounts at registered FCMs will not be commingled with accounts used for Exempt DCO clearing. Finally, U.S. FCMs are not put at a competitive disadvantage to their foreign counterparts. For these reasons, I support the changes made to the proposed rule that result in an appropriate, codified approach to exempting foreign DCOs who meet appropriate standards.

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